FILED
FEB 15 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 592

HENRY R. WITTE,
Petitioner,

v.

THE STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

JOSEPH SITNICK,
Counsel for Petitioner,
416 Fifth Street, N.W.,
Washington 1, D. C.

Of Counsel:
BENJAMIN I. CANTOR,
1035 Grand Concourse,
N. Y. C. 52, N. Y.

Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

INDEX

SUBJECT INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW (Majority)	1
OPINION BELOW (Minority)	1
JURISDICTIONAL STATEMENT	2
QUESTIONS PRESENTED	1
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
SPECIFICATION OF ERROR TO BE URGED	31
REASONS FOR GRANTING THE WRIT	32
CONCLUSION	49

TABLE OF CASES CITED

Amoskeag Mfg. Co. v. Head, 59 N. H. 332	47
Arndstein v. McCarthy, 254 U. S. 71	46
Bihn v. U. S., 328 U. S. 633	36
Bollenbach v. U. S., 326 U. S. 607	36
Brown v. Mississippi, 297 U. S. 278	46
Bute v. Illinois, 333 U. S. 640	48
Cassell v. Texas, 339 U. S. 282	33
Chambers v. Florida, 309 U. S. 227, 236-237	48
Denis v. U. S., 339 U. S. 162, 173	36
Koteakos v. U. S., 328 U. S. 750	37, 47
Krulewitch v. U. S., 336 U. S. 440, 444-445	47
People v. Fielding, 158 N. Y. 542	34
People v. Levan, 285 N. Y. 296	37
People v. Moran, 246 N. Y. 100	35
People v. Wolf, 183 N. Y. 464	36
Rogers v. U. S. 340 U. S. 367	46
State v. Bogan, 13 N. J. 137	35
State v. Costa, 11 N. J. 239	35, 48
State v. Grillo, 11 N. J. 193	35
Stroble v. California, 343 U. S. 181, 201	34
United States v. Marzano, 149 F. 2d 923, 926	45
Vierick v. U. S., 318 U. S. 237	37-38
Williams v. Kaiser, 323 U. S. 471, 475	33

TEXTS CITED

53 Am. Jur. p. 400, Sec. 495	32
43 Harvard Law Rev. 164	36
Modern Proc. and Jud. Adm.—Vanderbilt	38

In The

Supreme Court of the United States

October Term, 1953

No. .....

HENRY R. WITTE,
Petitioner,

v.

THE STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioner, Henry R. Witte, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of New Jersey in this case.

Opinion Below

The opinions of the Supreme Court of New Jersey are reported in 13 N. J. 598, dissenting opinion, 13 N. J. 616, and appear in the Record beginning at page 1348, dissenting opinion, beginning at page 1360 of the Record.

Jurisdiction

The opinion of the Supreme Court of New Jersey was rendered on the 23rd day of November, 1953, to which petitioner filed a Petition for Rehearing, which petition was denied on the 21st day of December, 1953; judgment of that Court was entered on the 21st day of December, 1953. The jurisdiction of this Court is invoked under Title 28, Section 1257 (3), United States Code.

QUESTIONS PRESENTED

I. Whether petitioner's right to a fair and impartial trial under the Due Process Clause of the Fourteenth Amendment was violated by the actions and conduct of the prosecutor in persisting, in the presence of the jury, and over objection, in asking a State witness whether the lawyer then representing petitioner had also represented this witness and members of a gambling syndicate, naming them; and whether under these circumstances, the court should have declared a mistrial.

II. Whether petitioner's right to a fair and impartial trial was violated by the conduct and actions of the prosecutor in persisting, over objection, and in the presence of the jury, in asking questions of a State witness, insinuating that at the time when petitioner's lawyer was a prosecutor, this witness, a convicted gambler, had been in league with the lawyer to violate the law; and whether, under these circumstances, the Court should have declared a mistrial.

III. Whether petitioner's right to a fair and impartial trial was violated by the judge admonishing and threatening the witness referred to in the foregoing questions, to return him from whence he came, in the presence of the jury; and whether under these circumstances the court should have declared a mistrial.

IV. Whether petitioner's right to a fair and impartial trial was violated when, in the presence of the jury, the court permitted the prosecutor to persist in the questioning

of a State witness, a former subordinate of petitioner (the witness then being under indictment), when the prosecutor knew that the witness would continue to assert his constitutional privilege against self-incrimination; and whether under these circumstances the court should have declared a mistrial.

V. Whether petitioner's right to a fair and impartial trial was violated by the prosecutor's protracting of the trial by the introduction of many witnesses and many exhibits having no relation to the charges against petitioner; and whether under these circumstances the court should have declared a mistrial.

VI. Whether the pronounced and persistent conduct of the prosecutor, as outlined in the foregoing questions, did not have a probable cumulative effect upon the jury, so as to deprive petitioner of a fair and impartial trial, requiring the court to declare a mistrial.

STATUTE INVOLVED

N. J. Revised Statutes, Chapter 103, Sec. 1, Title 2:

> "Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors."

STATEMENT OF THE CASE

On July 25, 1951, the petitioner, Chief of Police of the Borough of Lodi, County of Bergen, State of New Jersey, was indicted by the Bergen County Grand Jury (R. 1a-28a), for non-feasance in office. The indictment contained nine counts. Count 8 was abandoned by the State on the day of trial, and it was accordingly dismissed. (R. 39a)

The trial was had before a jury. It started September 22, 1952, and was concluded October 22, 1952 (16 or 17 actual trial days (R. 1324a). The State produced 57 witnesses, many of whom had appeared and testified, including

petitioner, before the Kefauver Crime Investigating Committee prior to the filing of the indictment against the petitioner herein. In addition thereto, the State introduced a tremendous volume of exhibits, none of which have been presented in the appendix as they have no bearing on the questions raised, namely: Did the petitioner have a fair trial pursuant to law? The petitioner did not take the witness stand, upon the advice of his counsel, but rested upon the proof adduced by the State. (R. 1335a-1336a)

On motion of the petitioner's attorney, the Court dismissed Counts 2, 3, and 4, respectively (R. 1282a, R. 1283a). The jury rendered a verdict of guilty as to Counts 1, 5, 6, 7, and 9; and on December 5, 1952, the Court suspended sentence on Count 1 [1], and sentenced petitioner to six months in the county jail on Counts 5[2], 6[3], 7[4], and 9[5], respectively,

---

[1] The Court: Now, taking this first count, that relates to Costa's Barn.
Mr. Harris: Yes, sir.
Mr. Selser: For a period from 1947 to 1950.
The Court: 1947 to 1949.
Now, on that count it seems to me to be contrary to the ordinary run of common sense that Costa's Barn was operated by the crap shooters after the picture of the Barn was published in the Hudson Dispatch, I think it was, —

Mr. Selser: That is right; August, 1948.
The Court: — in August, 1948. I cannot conceive of those smooth articles, such as Adonis and Guarini and Lynch and Longano and the others, operating that place after it was so publicized. Can you, Mr. Harris?

Mr. Harris: That was the proof.
The Court: Well, the proof on that line was that you had a fellow named Seidenburg, some drunk from Newark, who said that he had shot crap there after August. I wouldn't believe him. Then you had a stick man named Caporale, who vaguely said that he acted as a stick man after August. I wouldn't believe him, either. R. 1321a-1322a.)

* * * * * * * * * * *

On the 1st count, that is, Costa's Barn, I am satisfied that there is some doubt as to his guilt on that count; that is, abstractly. The jury has found him guilty, and I must accept that in the matter of penalty. So on the first count, the sentence will be suspended. (R. 1337a.)

[2] (R. 1322a-1323a)
Now, the next one is the 5th, which relates to 7 Nicholson Street. That was the Perillo operation, wasn't it?

Mr. Selser: Yes.

and sentences to run concurrently, and fined petitioner $2,000 (R. 1339a)[6].

The Court: Where Bonehead Shine operated?

Mr. Selser: Yes, sir.

The Court: Now, refresh my recollection on that. There was a raid there, was there not, by the County Detectives, in which Witte took part?

Mr. Selser: Yes, sir.

The Court: And certain of them were arrested, but Perillo wasn't; isn't that it?

Mr. Selser: That is correct.

The Court: That fellow that testified here, what was his name, the one that is in prison now? What was his name, Mr. Harris?

Mr. Harris: Salvado, sir.

The Court: Salvado, yes.

Mr. Selser: Salvado was the only one found there. Of course, it was the State's contention that certain evidence then seized would have indicated that Perillo was a principal.

[3] The Court: Well, he did nothing about Wagner's telephone.

Mr. Selser: He did nothing about getting back Wagner's telephone, Judge, without knowledge, without knowledge that Wagner's phone was used for bookmaking. And why in the name of God, Judge, would a cop, a chief of police, suppose that one of his own men would permit his phone to be used for bookmaking?

The Court: Well, that is another feature; he may have been double-crossed by some of the members of his own department. (R. 1332a) Mrs. Wagner never told her husband (a policeman) and/or petitioner that she had rented the room to Astore, although she knew that there was something suspicious about Astore. (R. 1030a-1041a)

[4] State witness testified that he had rented a room in his house to one Astore and did not know how Astore was using the room; that although he saw wires leading to that room, he never investigated further, never advised petitioner; that petitioner came around to the house to investigate and questioned the witness, looked through the house, but that Astore had moved out about two weeks before then, and nothing was found. (R. 976a-991a)

[5] Chief of Police of Wood-Ridge and the petitioner went to the premises upon complaint made by the former to the latter that bookmaking was carried on in said premises. No evidence of bookmaking was discovered upon investigation. (R. 575a-602a)

[6] The Court: Well, boiled down to its essence, what this man stands convicted of, actually, is his failure to be a skilled investigator, a Sherlock Holmes, so to speak; isn't that so?

Mr. Harris: No sir.

The Court: Well, there is nothing to indicate that he demanded or received any money for failing to perform his duty, is there?

Mr. Harris: This man deliberately, by design, failed to perform his duty. That is what the jury said.

The Court: Because of the element of willfulness in the indictment?

Mr. Harris: That was the finding of the jury.

All nine counts of the indictment are similarly patterned, except that the fifth paragraph of each count states a different specific place where and the times when gambling in the Borough of Lodi was conducted. Each count identified the petitioner as the Chief of Police of said Borough and County; and it was stipulated at the trial that petitioner was such public officer from November 20, 1920, to September 30, 1950 (R. 41a).

Each count alleges that petitioner knowingly and willfully failed to perform a public duty in relation to gaming on the premises and during the time therein designated in violation of law. Specifically, petitioner failed in his "pub-

---

The Court: Of course, it would be much easier if there were some proof that he had received money, because I have an aversion to public officials who are grafters.

What have you to say, Mr. Selser?

Mr. Selser: Judge Leyden, for 30 years, to my knowledge, and to the knowledge of most of the people now resident of Bergen County, Witte was Chief of Police of the Borough of Lodi, doing a very excellent job as such Chief of Police.

The Court: I think I have known him for 30 years myself, —

Mr. Selser: You have known him, and —

The Court: — Officially R. 1325a-1326a)

The Court: Well, I have given this matter considerable thought, conferred with the Probation Department, the Prosecutor, Mr. Selser; and in imposing the sentence, I have in mind a number of things that I gather from the Probation pre-sentence report, amongst which are that he was the Chief of Police in Lodi for 30 or 32 years, has no criminal record, and will lose his pension, and there is also a great likelihood of his losing the contribution that he put in the Pension Fund; that he only went to school to the fourth grade, although that is no disgrace; but it might bear on his ability as an investigator or detective; also that he is suffering from ulcers and eats a special diet; that he has another physical condition that need not now be mentioned; and primarily the fact that there is nothing in the case to indicate any grafting or receiving or demanding of money. And as I look upon it, it is a situation really of negligence and, to take the verdict of the jury, perhaps active wrongdoing, in the sense of affirmative negligence in knowing things, or noticing things existed and not pursuing them.

I don't know of another case like it. In nearly every one that I have read or had anything to do with, usually there is some element of grafting involved, taking money; and if that were the situation here, I would have no particular hesitancy, although I have known Witte for years officially, not intimately. But I am also torn the other way by the fact that punishment is not only punishment to the offender, but to serve as an example to other potential wrongdoers. It is a most difficult duty, and one that I have no desire to perform. R. 1336a-1337a)

lic duty of using and exercising all proper, reasonable, and effective means, and all lawful means in his power and diligence for the detection, apprehension, arrest, and conviction of offenders against the laws," "for preserving the public peace and insuring good order" in the Borough, and for "suppressing" as disorderly houses, places used for gaming, bookmaking, lotteries, and so on.

Count 1 referred to Costa's Barn, on Route 6; Count 5 referred to 7 Nicholson Street; Count 6 referred to 334 Main Street; Count 7 referred to 255 Garibaldi Avenue; and Count 9 referred to 11 Terhune Avenue.

Amongst the 57 witnesses called by the State was one Anthony Guarini, one of the "Big Five" of the gambling syndicate, who testified as follows: (R. 444a-457a; 558a-559a; 573a-574a.)

Q. Mr. Guarini, do you remember whether or not you had counsel at the time of your indictment in 1950? A. I remember, yes.

Q. Who was that counsel?

Mr. Selser: I object to that.

The Court: I will allow it.

A. Mr. Frank J. Guarini of Jersey City.

Q. Did you consult with your counsel with reference to whether or not you should enter a plea of guilty to the indictment?

Mr. Selser: I object to that.

The Court: I will allow it.

Mr. Selser: May I put a reason for the objection? This man is not on trial, sir, and any consultations he may have had with his own counsel are certainly not evidential in a proceeding against Chief Witte unless it be first established that Chief Witte was present and was called upon by reason of something that may have been said to make some defense or statement with regard thereto.

The Court: I will allow it. You may note your objection.

* * * * * * * * * *

A. I don't know what I consulted with my attorney at the present at that time. My attorney happened to be my brother and I thought he was doing everything for the best interests of me, so I don't think I questioned him on it.

Q. Did you enter your plea at his advice?

Mr. Selser: I object to that.

The Court: I will allow it.

Mr. Selser: The same grounds as heretofore urged and may I go one step further. This is not the way to prove a record, on this ground, too.

Mr. Harris: If we get a denial, this man denies it, I can prove it, but he hasn't denied it.

Mr. Selser: He is attacking credibility on what?

The Court: Go ahead. I will allow it. You may note your objection.

* * * * * * * * * * *

Q. Mr. Guarini, did you or did you not enter a plea to an indictment charging that you maintained a disorderly house where dice games were carried on at Costa's Barn in Lodi between the period of December, 1946, the first day of that month, and the first day of June, 1949?

Mr. Selser: I object to this question, if your Honor please. It has been asked several times and the witness has already said that if those dates are in the indictment they are wrong.

Mr. Harris: I did not ask, if your Honor please, whether those dates are wrong yet. I simply want to know whether he pleaded to the indictment.

The Court: I will allow it again.

A. I pleaded to that indictment, but if those dates are in that indictment they are wrong.

Q. Now, did you plead guilty to that indictment?

Mr. Selser: I submit he has answered the question.

The Court: No. I will let it be asked again.

A. I pleaded to that indictment.

Q. Did you plead guilty to that indictment? A. I did, Mr. Harris.

* * * * * * * * * * *

Q. And did you on the 21st day of May, 1951, plead non vult to an indictment charging that you between January 24, 1949 and March 31, 1949 operated a dice game at those same premises? A. Is that Costa's?

Q. Yes. A. If it is in the indictment and I pleaded to it, I did.

* * * * * * * * * *

Q. Did you receive a copy of that indictment before you entered a plea to it? A. I don't remember.

Q. Did you have a lawyer? A. I had a lawyer.

Q. Who was your lawyer?

Mr. Selser: I object to it.

The Court: I will allow it.

Q. Come on, tell the Jury who your lawyer was. A. Why, Mr. Selser, you know who my lawyer was.

Mr. Selser: I move for a mistrial.

The Witness: What is this, Mr. Harris, are you trying to bully me? Your Honor, I appeared before this Court. This is my first time as a witness.

The Court: You better be very quiet. You are not in a very good position and don't forget that.

The Witness: Your Honor —

The Court: Let's not have any outbursts from you because ultimately you will find yourself back where you just came from.

The Witness: Your Honor, I have been in this court for two trials already.

The Court: Now keep your mouth shut and answer questions. Now, what is your difficulty?

Mr. Selser: I move for a mistrial.

The Court: Why?

Mr. Selser: Because this was a deliberate attempt on the part of the State to prejudice the rights of this defendant.

The Court: I don't think so.

Mr. Selser: I do, sir, and I urge my motion and I still urge my motion.

The Court: No, Mr. Selser.

Mr. Harris: This man is evading the question of whether or not he was given a copy of the indictment.

Mr. Selser: Will your Honor send the Jury out?

The Court: Wait a minute.

(Continuing) And consulted his lawyer at the time he pleaded. I think the State can show who his lawyer was, whether he consulted with him, whether he understood the indictment, because I am most interested in that myself because I happened to preside at that time.

Mr. Selser: On the second, not the first.

The Court: And I think I know what went on.

Mr. Selser: I know you do, sir.

The Court: And if this is going to be anything contrary to what went on, I want to know because I can take further proceedings about it and I won't hesitate to do that.

Mr. Selser: I would love to have your Honor do it. Does your Honor wish me to make a statement now in the presence of the Jury?

The Court: No, I will deny your motion for a mistrial.

Mr. Selser: I must state it upon the record. I will ask your Honor either in Chambers or somewhere to hear the statement I am about to make. I did not want to say it in the presence of the Jury unless your Honor tells me it must be so done.

The Court: I don't know. What is the purpose of the secrecy?

Mr. Selser: I am going to have to go on the witness stand now as a witness in this cause to prove that this man never even saw the indictment. I offered his plea and he agreed to offer the plea without even knowing the dates which were set up in the indictment.

The Court: Can you go back on that now?

Mr. Selser: What?

The Court: Can you go back on that now?

Mr. Selser: I don't care. I am not asking him to go back. He served his term in prison.

The Court: You cannot play fast and loose.

Mr. Selser: I am not playing fast and loose, sir.

The Court: If he pleaded, it is obvious he knew what he was doing.

Mr. Selser: I am not playing fast and loose.

The Court: I am talking about him.

Mr. Selser: That does not prove any fact except that he pleaded. That has been the thing I am arguing with

your Honor about. I did this and he never saw the dates in the indictmnt because after he got to State's Prison he complained to me about it, sir.

Mr. Harris: If your Honor please, Mr. Selser's statement is untimely. It was deliberately made.

The Court: Let's get this straightened out. My recollection is in all of those cases I have been particular and said to these people, "Do you understand what you are doing?"

Mr. Selser: Yes, sir.

The Court: Now, I wonder if that shows up on the minutes.

Mr. Selser: It shows in the court reporter's records and it is printed, if your Honor please.

The Court: What day was this?

Mr. Harris: May 21, 1951.

The Court: All right, we will take a recess. Get hold of Mr. Myer and bring him over with his book of May 21, 1951. We will just take a short recess and get this ironed out now.

(Recess. After Recess Court polls the Jury.)

The Court: During the recess period I had the official court reporter who took the proceedings on May 21, 1951, when these pleas were offered and accepted, and he read back his minutes in the presence of Mr. Selser and also in the presence of Mr. Harris, and of course in my presence; and it does appear that my recollection was correct that in the course of that procedure I asked whether those defendants knew what they were doing, and the answer by Mr. Selser was that they did know what they were doing. That is substantially correct?

Mr. Selser: Yes, sir. I said they knew, yes sir.

The Court: Now, that brings us to your motion for a mistrial and your grounds are what?

Mr. Selser: My grounds are, sir, it will become necessary for me to become a witness in this proceeding to prove certain facts which I think in my judgment are necessary to present to the Jury a true and entire picture of the matters which were brought into being in this extraneous matter, and I do not see how I can continue as counsel and also become a witness in the cause. May I say to your Honor that the minutes which were read to your Honor during the recess disclosed a statement then made by me in connection with the offer of

plea that the offer of plea was the result of, I think I used the word tremendous negotiations, and this fact is the fact with regard to which I feel it is necessary that there be testimony.

The Court: Well, insofar as your present application is concerned, I will deal with that problem if and when it becomes necessary for you to become a witness. I will deny your motion for a mistrial on the grounds stated and you may note your objection, of course, to that ruling.

Mr. Selser: Yes, sir.

The Court: We will proceed.

By Mr. Harris:

Q. Mr. Guarini, I am going to ask you this question again. Is it not the fact that on May 21, 1951 you entered a plea of non vult to an indictment in this Court charging you that you did keep a disorderly house where dice games were carried on at Costa's Barn in Route 6 in Lodi between January 24 and March 31, 1949?

Mr. Selser: I press my objection on the same grounds as heretofore urged.

The Court: I will allow it. You may note your objection.

A. I remember pleading some time about around that time, Mr. Harris. If that is the date mentioned in the indictment, it must be so. I don't remember the dates.

Q. Did you enter a plea of non vult to such an indictment?

Mr. Selser: I object to this that I may preserve my position. I don't want to be said to have waived.

The Court: I will allow it.

A. I believe I pleaded to such an indictment if that is the date. I don't know the dates.

Q. All I want, Mr. Guarini, if you remember, is whether or not you have entered a plea of non vult to an indictment which I have described.

Mr. Selser: I object to it, to the form of the question. I don't think counsel has the right to want anybody to say anything except the truth.

The Court: I will allow it. You may note your objection.

A. All I can tell you, Mr. Harris, is that I pleaded to it. I know I did. The dates I don't know.

Q. Then you did plead to it? A. I did plead, yes, if that is the date mentioned.

Q. That is the date mentioned on the record of your plea. Now I am asking you whether you did plead. A. Then I did plead if that is the date mentioned in the record.

Q. Now, did you on that same day, May 21, 1951, enter a plea of non vult to an indictment charging that you between October 20, 1949, and January 18, 1950 maintained a disorderly house at 224-228 Union Street in Lodi where dice games were carried on?

Mr. Selser: I object to this on the same grounds heretofore urged.

The Court: What is this, Hayes Garage?

Mr. Harris: Yes, sir.

The Court: What date?

Mr. Harris: May 21 is the date of the plea according to the record, and the dates charged in the indictment are October 20, 1949 to January 18, 1950.

By Mr. Harris:

Q. Did you plead to that one? A. I can give you the same answer, Mr. Harris. I pleaded to that indictment. I don't know it was on that day. I don't know the dates that was in it.

Q. But you did plead to it? A. I did plead to it.

Mr. Harris: If Your Honor please, I don't want to go over this once again, but I am not clear now as to whether or not a direct answer was obtained from Mr. Guarani with reference to my questions directed to a plea of guilty to an indictment on March 15, 1950.

Mr. Selser: I submit, if your Honor please, it was fully answered. He says his brother was then his attorney, and he pleaded to an indictment, but has no knowledge of the dates which were set up in it.

Mr. Harris: Mr. Selser, that is what you say. I think this witness ought to tell the Jury in his own way.

Mr. Selser: I was addressing his Honor.

The Court: I think he has answered, but if there is

any question about it, ask it again.

Mr. Harris: I want to clear it up, if your Honor please.

By Mr. Harris:

Q. Now, Mr. Guarini, it is a fact, is it not, that you entered a plea of guilty in March of 1950 to an indictment which charged that you and one Kitty Klein and Milton Frank maintained a disorderely house at Costa's Barn in Lodi where persons might come to game and play on roulette,, dice, and other things, between the dates of December 1, 1946 and June 1, 1949?

Mr. Selser: I object to this question, if your Honor please, on the same grounds as heretofore urged, that the record may not indicate any waiver by me of the point involved.

The Court: I will allow it. You may note your objection.

A. I also pleaded to that indictment, Mr. Harris.

Q. Thank you, Mr. Guarini. A. But I don't think those dates were correct.

Mr. Harris: If your Honor please, the latter part of that answer was volunteered and not responsive, and I ask that you strike it.

The Court: Strike it out.

Mr. Selser: May I be heard on this, if your Honor please?

The question was, did he plead not to an indictment on a certain date, but did he plead to an indictment which charges specific things, and certainly I think the witness has the right to say as he did say, "I am not conscious of any dates, I pleaded to an indictment."

The Court: It would seem to me the presumption would be that he pleaded, if he pleaded guilty, to the allegation in the indictment; and if the allegation contains certain days, he pleaded guilty to those days. How can you overcome that? You cannot excise from the indictment certain parts of it. It is a whole. It is an allegation. You either plead guilty, non vult, or not guilty to that charge.

Mr. Selser: Yes, that is unquestionably true; and if I operated one day, assuming I am a defendant on such an indictment, and I operated one day of the group of dates, I am guilty of the offense even though the State could not prove an operation during the whole period of time.

The Court: That may be.

Mr. Selser: So that these things are things which are confidential matters which pass between counsel and client, and which finally result in a judgment being entered; and the bases of it, the approach to it, are all things which cannot in this way be established as proving any fact. I doubt very much that all my clients had intelligence enough that I might discuss with them all these legal aspects.

The Court: That might be a matter going to the effect of it, the weight of it, the credibility of it, the substance of it.

Mr. Selser: Then am I not entitled to have it remain in the record so that I may discuss this fact—your Honor will hold me to the record in my summation.

The Court: There is no law against you calling this man as a witness if the time comes for that purpose.

Mr. Selser: Yes, but do I need to, where the attempt on the part of the State is to exclude an essential part of an answer which they solicit?

The Court: The answer is a volunteered answer, not responsive to the question. That is why it is to be stricken.

Mr. Selser: That is the point I make. It is like the question "Do you beat your wife as much as you used to do?" Of course, if I never beat her I do as much as I used to, but the question is improper.

The Court: All right, I will strike it out. You may note your objection.

Mr. Harris: If your Honor please, with your Honor's permission, although your Honor has already ruled, may I say that I have a distinct feeling of resentment because of Mr. Selser's studied effort to procure from this witness on direct examination on the part of the State what he knows he can very easily procure from this witness if he should call him and submit him to cross-examination. Now, I am asking the Court to instruct Mr. Selser, if you will, please, to desist from such

interference for that obvious purpose. I am under difficulties enough with these reluctant witnesses and I consider that I am proceeding within the rules and am engaged in attempting to elicit from this man the truth as near as I can get it.

The Court: No. I cannot anticipate.

Mr. Selser: I am going to resent that statement on the part of the State, and again because of it I move for a mistrial. It was unfair, unfortunate, and designed as a dirty, rotten trick to prejudice this cause.

The Court: I will deny your motion. You may note your objection. I cannot anticipate what Mr. Selser may or may not do, and I am afraid I cannot tell him how the case should be tried from his angle. All I can do is rule as the questions arise.

Anthony Guarini—for the State—Redirect

Q. Mr. Guarini, do you remember whether any particular incident concerning any particular individual gave rise to your suspending your Costa Barn operation, as you say you did a month before the newspaper article appeared? A. No, I can't say, Mr. Harris.

Q. You can't say? A. No.

Q. Did you have any conversation with anybody from the Prosecutor's office, whether it be a Prosecutor's detective or one of the assistant prosecutors, resulting in your suspending operations a month before this article appeared?

Mr. Selser: I object to that, if your Honor please.

The Court: I will allow it.

A. I never knew any prosecutor's detectives or any prosecutors. I never knew any of them.

Q. Did you know Mr. Selser? A. No, not at that time.

Q. You didn't know Mr. Selser at that time? A. No, I didn't know Mr. Selser at that time.

Q. Then you didn't know he was an assistant prosecutor then, did you? A. No, I did not.

Q. You did not.

Mr. Selser: Now, if the Court please, we finally got it into the record. I move a mistrial, if your Honor please, on the ground that this was deliberately done to

prejudice the trial of the issue in this matter; and it is now essential under any stage of the present inquiry, the extent to which it has gone, that I become a witness, sir, in the cause.

The Court: I will deny your motion.

Mr. Selser: It was brought out deliberately by counsel for the State, sir.

The Court: I will deny your motion. You may note your objection.

Mr. Selser: Yes, sir.

Q. Now, Mr. Guarini, when you were arrested in 1950, the fact is that you had some telephone conversations with your associates before you were arrested. Isn't that so?

Mr. Selser: I object to this, if the Court please.

The Court: Yes. I will sustain your objection.

Q. The fact of the matter, however, is Mr. Guarini, that you were not alone in this operation, were you?

Mr. Selser: I object to this.

The Court: I will allow that.

A. I refuse to answer that, Mr. Harris, on those grounds that it may incriminate me, may tend to incriminate me.

Q. Your disclosing the names of your associates, you say, will tend to incriminate you?

Mr. Selser: I object to this, if the Court please.

The Court: I will allow it.

Mr. Selser: I don't think counsel has a right to pursue this.

The Court: I will allow it.

A. I refuse to answer that, Mr. Harris, on the same grounds.

Q. Weren't you associated in this venture with Joe Adonis?

Mr. Selser: I object to this.

The Court: I will allow the question.

Mr. Selser: If your Honor please, what possible materiality can it have to the present issues? The question is not who did so. It is a question whether or not there was an operation going on and whether or not Witte knew it, not whether somebody else knew it. I object, if the Court please.

The Court: I will allow it.

A. I refuse to answer that, Mr. Harris, on the grounds that it may tend to incriminate me.

Mr. Harris: That is all.

The state also called one Stephen H. Marchese as a prosecution witness, a captain in the Lodi Police Department, and a subordinate of petitioner at the time petitioner was Chief of Police, and he testified as follows: (R. 756a-772a)

Stephen H. Marchese—for the State—Direct

Q. Do you have a nephew named John Marchese? A. I do.

• • • • • • • • • • •

Q. Now, Captain, did you know that John Marchese, your nephew, purchased a property at the corner of Charles Street and Harrison Avenue? A. I knew he owned the building.

Q. You knew he owned the building. Did you have any connection with that building whatever? A. No, I didn't.

Q. You did not. A. Wait.

The Court: The jurors cannot hear the witness.

Mr. Harris: The witness raised his hand. Apparently he wants to say something. I don't know what it is.

The Witness: I refuse to answer any questions pertaining to that building because I am under indictment. I stand on my constitutional rights; anything I may say may tend to incriminate me.

By the Court:

Q. What have you been indicted for? A. There it is.

Q. This is still pending, is it? A. I don't know, Judge. I was here about three or four weeks ago and I got further indictments which are there now and one of the buildings is at 244 Harrison Avenue. The other is at 172 North Main Street, No. 7 Nicholson Street and 200 — Hayes Garage, anyway — 200 something, 224.

Q. You were arraigned and pleaded not guilty to this indictment? A. I did, that's right.

The Court: The witness shows me apparently what

is a copy of an indictment against Stephen H. Marchese, charging him with misconduct in office, Mr. Harris.

Mr. Harris: Yes, sir. I am aware of those indictments.

The Court: And the indictment relates apparently to the 172 North Main Street. I guess that's all, 172 North Main Street.

The Witness: They are all there.

Q. You have more? A. Yes.

The Court: And 244 Harrison Avenue and 224-228 Union Street, 7 Nicholson Street.

Q. Then you are also under a false swearing indictment, aren't you? A. (No response.)

The Court: Now, what was the question, Mr. Salbin? The Reporter reads the question as follows:

"Question: Did you have any connection with that building whatever? Answer: No, I didn't.

"Question: You did not?")

The Court: I think he is substantially within his rights to assert the privilege against self-incrimination, Mr. Harris.

Mr. Harris: If your Honor please, I haven't the slightest quarrel with his desire to refuse to answer on the ground it may tend to incriminate him, but as I conceive it, that does not prevent me from asking the question.

The Court: All right.

By Mr. Harris:

Q. Now, Mr. Marchese, what is the telephone number which you presently have in your home at 35 Charles Street? A. I refuse to answer that question on the ground that it may tend to incriminate me, because it might tend to incriminate me.

Q. Mr. Marchese, you own the property in which you live, don't you? A. I refuse to answer that question because it might tend to incriminate me.

Q. Now, sir, is the address at which you live also known as 31 Charles Street? A. I refuse to answer that question because the answers which I might give might tend to incriminate me.

Q. Did you have any connection whatever, Captain, with the transfer of Gregory 3-1639? A. I refuse to answer.

Q. Let me finish my question, please. From 244 Harrison Avenue to your home at 31 Charles Street in April of 1948? A. I refuse to answer.

Mr. Selser: I am going to object, if your Honor please. I can't see how this can be binding upon Chief Witte. It is incompetent, irrelevant, and immaterial to the charge presented against him as to whether this man did or did not do these things. It certainly is not evidential against Chief Witte.

The Court: He has refused to answer on the ground that his answer might incriminate him.

Q. Captain, do you recall a visit made to your home at 31 Charles Street by Captain Carbonetti and a detective from the Prosecutor's office? A. I refuse to answer.

Q. Just let me finish my question. Captain Carbonetti of the Lodi Police Department and a man from the Prosecutor's office in September of 1948? A. I refuse to answer because the answer I may give might tend to incriminate me. I am now under indictment.

Q. Mr. Marchese, did you have any conversation with Chief Witte concerning telephone number Gregory 3-1639, located in your home, which had been transferred some four months previous to the date of this conversation, if you had it, from 244 Harrison Avenue in Lodi to 31 Charles Street in Lodi? A. Are you finished?

Q. Yes, sir. A. I am under indictment and I refuse to answer the question because it might tend to incriminate me.

Q. Did you know, Captain, that Chief Witte had submitted a report to the Prosecutor of this county dated September 3, 1948, containing an investigation or report of investigation of the telephone in your home? A. Finished?

Q. Yes, sir. A. I refuse to answer because the answer I might give might tend to incriminate me. I am now under indictment since June of 1951.

Mr. Harris: I would like it clearly understood, if your Honor please, that this witness's refusal to answer upon the stated reason that it will tend to incriminate him has no reference whatever to the nature of the indictment brought against him or the fact that there is an indictment pending.

The Witness: I am under indictment.

Mr. Harris: That, I don't think, sir, is properly a part of this witness's answer. His answer under the Constitution is, as I conceive it, that any answer given by him will tend to incriminate him. It doesn't depend on whether he is under indictment or whether he is not under indictment, and it doesn't depend on whether he is charged or isn't charged.

The Court: I will grant you that, but what conclusion do you draw from that?

Mr. Harris: I draw no conclusion. That is for this Jury to draw. This man is refusing to answer these questions directed to him by me because he says that if he does answer, they may incriminate him.

Mr. Selser: He says they may tend to, and certainly the Jury can draw no inference from it and I object to the remarks made by counsel as to the right of the Jury in the law of the case if there is no evidence.

The Court: So far, he hasn't said anything yet.

Mr. Selser: If your Honor please, he said the Jury may infer from his refusal.

The Court: I can take care of that. I don't get your point, Mr. Harris. Are you complaining about the technical manner in which he asserts his privilege?

Mr. Harris: I call your Honor's attention to the fact that this witness has included in his answer a statement that he is under indictment. I say, sir, that that is immaterial and there is no place in his answer for that.

The Court: It makes him worse as far as he is concerned, doesn't it?

Mr. Harris: I am simply bringing that to your Honor's attention. This man has a right under our Constitution to refuse to answer a question under oath if his answer to that question will incriminate or will tend to incriminate him. Now that is irrespective or whether any charge is presently laid against him.

The Court: Then you merely go to the form in which he asserts his privilege.

Mr. Harris: Yes, sir. I don't want it inferred from this witness's answer that if he were not under indictment he would answer and without asserting his Constitutional right. I don't want that language included in his answer because it will tend to indicate that that is his frame of mind. His only Constitutional privilege, I say again, is if the answer under oath will tend to or will incriminate him. Then he has a right to refuse to answer, stating his ground.

Mr. Selser: I object, if the Court please, to counsel making a statement as to what he wants or doesn't want. I don't think that has any place in the record.

The Court: I think it is six of one and half a dozen of another. I don't see much difference.

What he is doing is asserting the privilege against self-incrimination.

Mr. Harris: Precisely. I simply say it doesn't depend on whether he is indicted or not.

The Court: It doesn't make any difference whether he is indicted or under a charge or not, but it would seem to me the fact that he is under a pending indictment would give more weight to his assertion of privilege.

Mr. Harris: All right. I am giving all the benefit he is entitled to.

* * * * * * * * * *

By Mr. Harris:

Q. Now, sir, did you make any arrangement with the Bell Fuel Oil Company for the delivery of fuel oil to 244 Harrison Avenue in Lodi in 1949? A. I am now under indictment and any answer that I may tend to give might incriminate me.

By the Court:

Q. You refuse to answer the question? A. I refuse to answer the question.

By Mr. Harris:

Q. On the grounds stated:

The Court: On the ground that it might tend to incriminate him.

Q. Did you have any connection with a telephone installed at 244 Harrison Avenue bearing the number Prescott-Passaic 3-0191? A. I refuse to answer. Any answer I might give might tend to incriminate me.

Q. I show you Exhibit number 7, a photostatic copy of a check, check of the New Jersey Bell Telephone Company, and ask you if the endorsement on the reverse side was not written by you? A. I refuse to answer. I am now under indictment and any answer I might give might tend to incriminate me.

Mr. Harris: Mark this, too, please.
(Paper received as Exhibit S-75 for identification.)

By Mr. Harris:

Q. Mr. Marchese, I hand you a photostatic copy of a check dated June 30, 1949, to the order of Furnace Oil Company.

Mr. Selser: I object to counsel reading in presence of the Jury from a document not in evidence. I think he can show it to the witness without stating the contents.

Mr. Harris: I have no other means of identifying this for the record, if your Honor please.

Mr. Selser: You can mark it for identification, if your Honor please.

The Court: I think so. Is it marked for identification?

Mr. Harris: Yes, sir.

The Court: I think you can refer to it by its marking for identification.

Q. Mr. Marchese, I am handing you S-74 for identification, a photostatic copy of a check. Will you look at it, please, and tell us whether or not you signed that check, the original of that check? A. I refuse to answer as it might tend to incriminate me.

Q. I show you S-75 for identification, a photostatic copy

of a check, Mr. Marchese, and ask you if the signature on that photostatic copy was not affixed by you on the original? A. I refuse to answer as it might tend to incriminate me.

Q. Mr. Marchese, did you ever receive from your nephew John any moneys representing any part of the proceeds of the sale of the property known as 244 Harrison Avenue in Lodi? A. I refuse to answer. The answer might tend to incriminate me.

Mr. Harris: Mark this, please.
(Paper received as Exhibit S-76 for identification.)

Q. Mr. Marchese, I show you S-76 for identification, a check, and ask you if that is not your endorsement on the reverse side? A. I refuse to answer. The answer might tend to incriminate me.

Mr. Harris: Mark these, please.
(Paper received as Exhibit S-76 for identification.)

Q. Mr. Marchese, I show you S-76 for identification, a check, and ask you if that is not your endorsement on the reverse side? A. I refuse ton answer. The answer might tend to incriminate me.

Mr. Harris: Mark these, please.)
(Tickets and slips received as Exhibit S-77 for identification.)

Q. Mr. Marchese, I hand you S-77 for identification, among which exhibits are a number of tickets or slips of paper. I ask you to look at those slips of paper and tell us whether or not that signature is that of your wife. A. I refuse to answer. The answer might tend to incriminate me.

Q. Mr. Marchese, is it true that in 1949 and part of 1950 you had an interest, a one-third interest, in real estate in Lodi known as 172 North Main Street? A. Finished.

Q. Yes. A. I refuse to answer. The answer might tend to incriminate me.

Q. Who were the other individuals who owned the other two-thirds interest in that property during this period? A.

I refuse to answer. The answer might tend to incriminate me.

Q. Mr. Marchese, during that period from October, 1949, until May of 1950, do you know where your nephew John lived? A. I refuse to answer. The answer might tend to incriminate me.

Q. Did you have anything to do with an application for electric and gas service in an apartment at 172 North Main Street in the name of John A. Marchese during that period October, 1949 to May, 1950? A. I refuse to answer. The answer may tend to incriminate me.

Q. Do you know a man named John Lasso? A. I refuse to answer. The answer might tend to incriminate me.

Q. Do you know a man named Sidney Wolf? A. I refuse to answer. The answer might tend to incriminate me.

Q. Was either John Lasso or Sidney Wolf ever tenants of yours at 172 North Main street in Lido? A. I refuse to answer. The answer might tend to incriminate me, on advice of my counsel.

Q. Did you have anything to do, Mr. Marchese, with the tapping of a telephone from a place occupied by a Mrs. Betty Cangelosi at 24 Green Court into the premises at 172 North Main Street?

Mr. Selser: I object to it, if your Honor please. I object to the form of the question. It assumes a fact, this being their witness. They called him. I don't think they have a right to assume a fact and present a question in this form or substance.

Mr. Harris: If your Honor please, I am presuming nothing that was not proved.

The Court: I will allow the question.

A. I refuse to answer. The answer might tend to incriminate me.

Q. Did you have anything to do with the tapping of a telephone from the Air Vent Sheet Metal at 337 Main Street in Lodi into 172 North Main Street?

Mr. Selser: Same objection, if your Honor please.

The Court: I will allow it. You may note your objection.

A. I refuse to answer. The answer might tend to incriminate me, on advice of my counsel, Mr. Vorsanger.

Q. Did you ever receive any rent, Mr. Marchese, during that period from October, 1949 to May, 1950 from any tenants at 172 North Main Street in Lodi? A. I refuse to answer. The answer might tend to incriminate me.

Mr. Harris: Mark these for identification as a group, please.

(12 checks received as Exhibit S-78 for identification.)

Q. I show you a group of 12 checks marked S-78 for identification, Mr. Marchese, and ask you if your indorsements do not appear on the reverse side of each of those checks. A. I refuse to answer. The answer might tend to incriminate me, being under indictment at the present time.

Q. Mr. Marchese, isn't it the fact that the exhibits for identification containing these 12 checks which I just handed you actually are payments for rent from 172 North Main Street, Lodi?

Mr. Selser: I object to the form and substance of the question, if your Honor please.

The Court: I will allow it.

Mr. Selser: The witness already said he refuses to answer on the ground of self-incrimination.

Mr. Harris: That was about his endorsement.

The Court: That doesn't make the question objectionable. I will allow it.

Mr. Selser: I think this form and substance is objectionable. I have objected if your Honor has ruled.

A. I refuse to answer. The answer might tend to incriminate me, being under indictment at the present time.

Mr. Harris: Mark that, please.

(Paper received as Exhibit S-79 for identification.)

Q. I show you this exhibit S-79 for identification, Mr. Marchese, and ask you if you know the individual who

affixed the signature "J. Marchese" on the top slip. A. I refuse to answer. The answer might tend to incriminate me, I being under indictment at the present time.

Q. Now, sir, I ask you to again look at the exhibit for identification number S-79, and tell me whether or not your wife signed slip number 01142. A. I refuse to answer. The answer might tend to incriminate me, being under indictment at the present time.

Q. Now, sir, looking at the same exhibit for identification, I direct your attention to slip 02781. Do you know anyone named Angelo Perillo? A. I refuse to answer. The answer might tend to incriminate me, me being under indictment at the present time.

Q. Was Angelo Perillo ever a tenant at North Main Street? A. I refuse to answer. The answer might tend to incriminate me, me being under indictment at the present time.

Q. I direct your attention to the same exhibit for identification, slip number 09022. I ask you, Mr. Marchese, if the signature on the slip is yours. A. I refuse to answer. The answer might tend to incrinminate me. I am under indictment at the present time.

The Court: Are we getting anywhere, Mr. Harris?

Mr. Harris: I think we are.

The Court: It would seem to me that you already have proof there was some bookmaking or gambling operation going on at 172 North Main Street and at 244 Harrison Avenue.

Mr. Harris: Yes, sir.

The Court: Why pursue it any further?

Mr. Harris: I am engaged now in establishing a connection between this witness and the defendant in this case.

The Court: All right.

Mr. Harris: No further questions.

Cross-examination by Mr. Selser:

Q. Mr. Marchese, you said on two occasions, as I remem-

ber it, that you made these responses on the advice of your counsel. Who is your counsel? A. Mr. Bert Vorsanger.

> Mr. Selser: If the Court please, I move to strike from the record all of the questions propounded by the State and answered by the defendant with the statement that he refused to answer on the ground that the answer might tend to incriminate. I move to strike from the record each and every of those questions and that answer.
>
> The Court: What is your basis for that?
>
> Mr. Selser: The basis is that they are not evedential for any purpose whatsoever, and therefore do not belong in the record; and the Jury may not speculate upon or infer from such negative or refusal of answer any fact or circumstances whatsoever, as they are complete nullities so far as this trial is concerned. I move that this be struck from on the record, each and every one.
>
> The Court: I don't see how I can do that. I will deny your motion. You may note your objection.
>
> Mr. Selser: Yes, sir. Nothing further.
>
> Mr. Harris: That is all.

There are in the first volume of the record alone 60 objections to the admission of "testimony", 55 of which were overruled. The following are references to testimony which had no relation to issues involved herein:

(R 1234a to 1237a and 1258a to 1264a, Motions to strike from the record exhibits S-101 to S-122 inclusive.)

The testimony of Peter Salvado starting at R. 1169a and concluding at R1186a shows that he was taking bets over two telephones at 7 Nicholson Street beginning in June or July, 1950 (R. 1174a). He was arrested September 13, 1950 (R. 1775a). Chief Witte was one of the arresting officers (R. 1176a). Papers and records were seized (R. 1177a). Salvado was taken to the Bergen County Prosecutor's Office (R. 1180a). Chief Witte left the raiding party at Lodi Police Headquarters and Salvado was taken to the Prosecutor's Office (R. 1181a). The Prosecutor's men were Millington, Delisle and Graber (R. 1182a). The "evidence" seized was taken to the Prose-

cu'or's Office (R. 1182a to 1183a). These "exhibits" were offered in evidence by the State (R. 1210a to 1218a) and admitted over objection (R. 1218a).

(R. 1237a to 1239a) Testimony of Aloysius J. Bittig as to a telephone in the name of George A. Goode located at 217 Boulevard, Hasbrouck Heights, Hasbrouck Heights 8-0892 (no evidence of illegal use).

(R. 1237a to 1239a) Testimony of Mr. Bittig as to a telephone in the name of Makers Mart Passaic 3-5435 inspected September 1, 1949 and March 14, 1950, disconnected May 10, 1950. (No evidence of illegal use and beyond the period charged with was July 1, 1949 to August 24, 1949.)

(R. 1240a) Testimony of Mr. Bittig that a telephone was installed in 1945 at 11 Terhune Pl. Passaic 3-1103 Passaic 3-1104 under the name of Kega and Tonsip trading as Dukes Cab Co.

(R. 1240a) Testimony of Mr. Bittig as to telephone Prescott 7-8300, Prescott 7-8301 "house closed" March 18, 1950 re-established January 28, 1952 and plant inspections July 11, 1947, July 14, 1947, February 17, 1948, September 1, 1949, March 14, 1950 and November 16, 1950. These 'phones were located at 11 Terhune Pl. (Periods charged July 1, 1949 to August 24, 1949.)

(R. 1241a) Mr. Bittig's testimony as to a complaint received by the Telephone Company about Gregory 3-1639 installed April 11, 1946 in the name of Joseph De Franco transferred November 28, 1947 to J. Marchese at 31 Charles Street, the complaint being received February 10, 1948. (This relates to 244 Harrison Avenue the period charged being March 1, 1949 to April 1, 1950.)

(R. 1242a) Testimony of Mr. Bittig of inspections made at 244 Harrison Avenue September 28, 1948.

(R. 1242a) Testimony of Mr. Bittig as to telephone Prescott 7-2345 located at 246 Harrison Avenue.

(R. 1242a) Testimony of Mr. Bittig as to telephone installed May 3, 1948 at 256 Harrison Avenue.

(R. 1242a) Testimony of Mr. Bittig as to Prescott 7-2345 disconnected October 11, 1949 at 246 Harrison Avenue.

(R. 1243a) Testimony of Mr. Bittig as to Gregory 3-1763 disconnected May 3, 1948 at Catalano's Hardware in Garfield.

(R. 1243a) Testimony of Mr. Bittig as to telephone issued to one Staffa at 120 Charles Street, Garfield.

172 North Main Street (March 1, 1949 to April 1, 1950).

(R. 1243a) Testimony of Mr. Bittig as to telephone of Paparozzi disconnected February 5, 1948.

(R. 1243a) Testimony of Mr. Bittig as to Passaic 2-6870 disconnected September 19, 1948.

(R. 1245a) Testimony of Mr. Bittig as to telephone at 327 Main Street disconnected after inspection April 5, 1950.

7 Nicholson Street

(R. 1245a) Testimony of Mr. Bittig as to Prescott 7-8217 located at 24 Cottage Pl. disconnected as result of a letter received by the telephone company from Mr. Orecchio, Chief of County Detectives.

255 Garaboldi Avenue

(R. 1245a) Testimony of Mr. Bittig as to Prescott 9-4263 installed December 8, 1948 disconnected November 16, 1949 at 85 Church Street.

All Cases

(R. 1246a) Testimony of Mr. Bittig describing the telephone company's method of inspection to prevent the telephone company becoming "an aider and abettor in bookmaking."

(R. 1252a) "I move to strike from the record testimony given by Mr. Walter G. Winne to the effect that complaints were being received from the Attorney General and directly from Commissioner Murtagh in New York.

"The Court: He identified that he communicated the complaints to the various Chiefs of Police, did he not?

"Mr Selser: Not to Chief Witte as such. There were particular things about which he was asked. I am not directing myself to this.

"I am directing myself to the overall attempt to show that Murtagh was communicating numerous complaints to Winne. It was never shown that they were communicated by Winnie to Witte, or that they had relationship to Lodi."

On appeal to the Supreme Court of New Jersey, two opinions were written. In the majority opinion, four of the seven members constituting the Court held that "There was no warrant whatever for the intimation that the accused's (petitioner's) trial attorney was also the attorney for the "big five," and the insinuation that the operator of Costa's Barn was in league with him when he was assistant to the prosecutor of the county. This was an indefensible maneuver for which no justification could be offered on the oral argument, and it is no answer to say that it came in the course of a long trial in which tempers flared." (R. 1355.)

However, despite that concession, the majority members of the Court held that the essentials of a fair and impartial trial, both under the State and Federal constitutions, were not violated, and therefore the errors committeed were harmless.

The three dissenting judges agreed that the conduct on the part of the prosecutor was an "indefensible maneuver," and that this testimony and that of others were harmful and prejudicial to the interest of the petitioner, and therefore he was not accorded a fair and impartial trial. (R. 1364.)

SPECIFICATION OF ERROR TO BE URGED

A. The Supreme Court of New Jersey erred in holding that the conduct of the prosecutor, although an "indefensible maneuver," was harmless and not violative of the

petitioner's Constitutional rights to a fair and impartial trial under the due process clause.

REASONS FOR GRANTING THE WRIT

This case raises serious questions as to the limitations which the Due process clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States; and a State court has decided important questions in a criminal proceeding, and such decisions is not in accord with applicable decisions of this Court.

The law is well settled that a public prosecutor is a quasi-judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice. It is not within his province to conduct himself by word or action which is calculated to humiliate and degrade the opposing party in the eyes of the jury. If he lays aside the impartiality that characterizes his official action and he becomes a heated partisan, and by vituperation of an accused and his counsel, *appeals to prejudice and seeks to secure a conviction at all hazards,* he ceases to properly represent the public interest, which demands no victim and asks no conviction through the aid of passion, sympathy, resentment, or "foul" or improper methods. His sole duty is to do equal right and justice to the state and accused in the ascertainment of truth, which is the object of the prosecution.

See 53 Am. Jur., Sec. 495, P. 400:

> "While it is the unquestionable privilege of counsel to indulge in all fair argument in favor of the contentions of his client, he goes outside of his duty and his rights when he attempts to excite prejudice in the minds of the jury against his adversary, thereby drawing the minds of the jury away from the matter in dispute and subjecting them to influence entirely foreign to the case."

In the instant case, *all* of the Judges of the Supreme Court of the State of New Jersey agree that the conduct of the prosecuting attorney violated the Fifth Canon of

Ethics of the American Bar Association, by reason of his asking the questions, as set forth herein above, of the witness Guarini. In fact, the majority opinion (R. 1355) says:

> "But there was no warrant whatever for the intimation that the accused's (petitioner's) trial attorney was also the attorney for the "big five," and the insinuation that the operator of Costa's Barn was in league with him when he was assistant to the prosecutor of the county. This was an *indefensible maneuver*, for which no justification could be offered on oral argument, and it is no answer to say that it came in the course of a long trial in which tempers flared." (Italics supplied.)

Yet, while they state that the conduct of the prosecuting attorney is "indefensible," they further state that there was sufficient evidence for the jury to find the defendant guilty of the crimes charged, in view of the jury's intelligence and understanding, in that they were able to differentiate between relevant and irrelevant, competent and incompetent, material and immaterial testimony; and that therefore the error was harmless because it did not affect a substantial right of the accused (petitioner) to a fair and impartial trial. This premise, in view of the sharp division amongst the learned jurists, is fallacious, since it makes no allowances for human frailty; and to say that such improper questions did not prejudice the defendant is to ignore human experience and the dictates of common sense.

In the case of *Cassell* v. *Texas*, 339 U. S. 282, Mr. Justice Jackson said:

> "The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh."

As tersely stated by Mr. Justice Douglas in the case of *Williams* v. *Kaiser*, 323 U. S. 471, 475:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law * * * He is unfamiliar with the rules of evidence * * *"

In the dissenting opinion in the case of *Stroble* v. *California*, 343 U. S. 181, Mr. Justice Frankfurter, at p. 201, said:

"Jurors are of course human beings, and even with the best of intentions in the world they are, in the well-known phrase of Holmes and Hughes, JJ, 'extremely likely to be impregnated by the environing atmosphere.'
(*Frank* v. *Mangum*, 237 U.S. 309) * * * If guilt here is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designated for all." (202).

In the case of *People* v. *Fielding*, 158 N. Y. 542, the Court said:

"* * * The jury might be told by the court to forget them (improper remarks; no such thing happened in the instant case), but could they forget them? They might be told to disregard them, but how can we be certain that they disregarded them. * * * instructions to the jury do not always neutralize (the objectionable language) either as a matter of law, or fact, the effect of improper remarks in their presence. (Citing cases).

* * * * * * * * * *

"From the observation of jurymen, we think the language under consideration would be apt to turn their minds against the defendant, divert their attention from the evidence, and prevent the exercise of sound and dispassionate judgment on the merits.
"* * * The language of the prosecuting officer, thus endorsed by the highest authority known to the jury, must have gone home to their minds with powerful and convincing effect, while the counsel for the

defendant was left in the attitude of a wrongdoer, trying to disturb the proceeding of the court.

"*Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law, because he has not had the fair and impartial trial which the law prescribes for a person charged with crime.* * * *" (Emphasis added).

The law enunciated in the Fielding case, *supra*, was cited with approval in the case of *State* v. *Bogen*, 13 N. J. 137.

In the case of *State* v. *Grillo*, 11 N. J. 193, Mr. Justice Heher, writing the dissenting opinion (in the instant case he wrote the prevailing opinion, four to three), cited with approval the language of Mr. Chief Justice Cardozo in the case of *People* v. *Moran*, 246 N. Y. 100, as follows:

> "A criminal, however shocking his crime may be, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law."

However, the same judges constituting the majority in the instant case, held in *State* v. *Costa*, 11 N. J. 239, that the trial court there committed reversible error in admitting the indictments wherein the "big five" had pleaded *non vult*, for the purpose of showing that Costa operated a gaming place known as "Costa's Barn" during the time alleged in the indictments, upon the ground that the pleas [redacted] of *non vult* were not evidential against Costa because not admitted by him or in any other wise binding upon him. In the case at bar, in order to circumvent the decision in the Costa case, the prosecution offered oral proof through the State witness Guarini as to the contents of his indictment, for the purpose of establishing the times when the gaming operations at Costa's Barn were conducted. (This witness was one of the "big five" mentioned in the Costa case.) This was the same evidence that had been ruled out by the same court, as constituting reversible error.

Counsel respectfully submits that an impression once made upon the mind of a juror, no matter how, will have more or less influence upon him when he retires to deliber-

ate upon the verdict given him; and no matter how honest or conscientious he may be, or how carefully he may have been instructed by the court not to permit such incompetent matters to influence him or have any bearing on the case, it will be very difficult, if not impossible, for him to separate the competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. (See 43 Harv. L. Rev., P. 164, by Prof. Edmund M. Morgan. Harv. L. School.)

In the case of *Denis* v. *U. S.*, 339 U. S. 162-173, Mr. Justice Jackson said:

> "The right to fair trial is the right that stands guardian over all other rights."

And in the case of *Bihn* v. *United States*, 328 U. S. 633, Mr. Justice Douglas said:

> "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such course would lead to serious intrusions on the historic function of the jury, under our system of government. See *Bollenbach* v. *United States*, 326 U. S. 607."

In the case of *People* v. *Wolf*, 183 N. Y. 464, Mr. Justice Vann said:

> "An unfair trial, especially in a criminal case, is a reproach to the administration of justice and occasions grave responsibility not only upon the prosecuting officer, but also upon the trial judge. *However strong the evidence against the defendant may be, if he did not have a fair trial, the judgment of conviction should not be permitted to stand.* (Italics supplied.)
>
> "A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law. The defendant did not have a fair trial, for the trial assistant introduced incompetent, immaterial, and improper evidence. The trial judge allowed and sanctioned continuous departures from the law by the prosecuting attorney, although he should have known that it was his duty to prevent them, even of his own motion, without suggestion from the defendant's counsel. It

was his duty not only to warn the prosecuting attorney to desist, but also if he continued (which he did) to rebuke him and punish him for contempt if necessary, to prevent further infraction of the law * * * *If his* (defendant's) *guilt is so clear, why should unwarranted means be used to secure a conviction?* Juries do not halt over their duties in such cases, but are swift to convict when the evidence permits. (Italics supplied)

"In such cases, reason needs to be safeguarded from prejudice by everything that caution and justice suggests, and courts should be firm and explicit in impressing upon prosecuting attorneys the necessity of strict adherence to rules of evidence and propriety of conduct so that jurors may, so far as possible, be unbiased and impartial."

In the case of *People* v. *Levan*, 285 N. Y. 296, Mr. Justice Lewis stated:

"There was thus injected into the case an issue which did not relate itself to the crime for which the defendant was being tried * * * The *virus thus implanted in the minds of the jury is not so easily extracted.*" (Italics supplied.)

In the case of *Kotteakos* v. *U. S.*, 328 U. S. 750, Mr. Justice Rutledge said:

"* * * The question is, not were they (jury) right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect that error had, or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own in the total setting * * *"

"The inquiry cannot be merely whether there was enough to support the issue, apart from the phase affected by the error. It is rather even so whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

In the case of *Vierick* v. *U. S.* 318 U. S. 237, Mr. Chief Justice Stone, writing the opinion of the Court, said:

"* * * we direct attention to conduct of the prosecuting attorney which we think prejudiced petitioner's

right to a fair trial, and which * * * might well have placed the judgment of conviction in jeopardy. In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. * * *

"*We think that the trial judge should have stopped counsel's discourse without waiting for an objection.* (In the instant case, objections were made and overruled.) 'The United States Attorney is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. *He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.* It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' *Berger* v. *U. S.*, 295 U. S. 78, 88. Compare *New York C. R. Co.* v. *Johnson*, 279 U. S. 310."

Counsel respectfully calls the attention of this learned court to a case book entitled "Modern Procedure and Judicial Administration," edited by the Chief Justice of the Supreme Court of the State of New Jersey, the Honorable Arthur T. Vanderbilt, wherein in Chapter XVI, he says:

"(5) Trial on the Merits:

The last great cause of public complaint with the law as administered in the courts is that all *too often a trial becomes a battle between the opposing counsel rather than an orderly and rational search for the truth on the merits of the controversy.* * * * Three factors in particular contribute to this great evil. The first is the notion that *a trial, and especially a criminal trial, is a sporting event rather than a search for truth with justice as its great objective.* * * * P. (1243)

"* * * There is no provision in the Bill of Rights

as important as the right to a fair trial, which the founding fathers took for granted, but which has been in eclipse in practice in many states for a century. *The right to a fair trial is superior to all the other rights guaranteed by the Bill of Rights, for without a fair trial one cannot vindicate any of his rights. We shall be faithless to the noblest traditions of our profession if, realizing our shortcomings in giving litigants a fair trial, we fail to take every necessary step to guard our heritage.*" (p. 1245-1246) (Italics supplied)

It is respectfully submitted that in view of the language as above stated by Mr. Chief Justice Vanderbilt, it is quite evident that the petitioner failed to receive a fair trial.

Counsel, with sincere apologies to this Honorable Court, feel impelled to quote exhaustively from the dissenting opinion from the State court, as the language therein expressed cannot be improved upon to set forth the issues involved herein.

The dissenting opinion, written by Mr. Justice Brennan, Jr., said:

"* * * the only difference I can see between the State's tactics in this trial and the tactics employed upon Costa's trial (reported *State* v. *Costa*, 11 N. J. 239 (1953); and 20 N. J. Super 28 (1952) is that where in Costa the evidence was frankly offered to establish operation in the period, here, balked by the decision in Costa, the State resorted to a *deliberate and carefully conceived plan of interrogation of Guarini* (one of the so-called "big five") *to achieve that result as regards the jury under cover of protestations that the effort was designed solely to affect Guarini's credibility.* What we struck down in Costa as improper, when the State openly disclosed its intention, we are here sanctioning, although the end was patently effected through calculated design to circumvent the limitations laid down for this form of inquiry. *The State hammered at Guarini over three days to force him to admit that his plea was to an indictment covering the period in question. If Guarini's credibility*

was actually the target, many hours, indeed days, could have been saved and the great part of the 144 pages of Guarini's printed testimony would have been unnecessary, if, faced with Guarini's disclaimer, the State had utilized the alternative device of putting Guarini's judgment record in evidence. *State* v. *Duelks*, 97 N. J. L. 43 (Sup. Ct. 1922); *State* v. *Silver*, 101 N. J. L. 232 (E. & A. 1925), affirming 2 N. J. Misc. 479 (Sup. Ct. 1924); *State* v. *Costa*, *supra*. It is significant that that record was marked for identification immediately after Guarini took the stand on the first day and answered the question whether he had pleaded to an indictment charging operation within the crucial period with the response that operation at Costa's Barn ceased in August 1948. Yet the State neither then nor at any time offered the record in evidence. Witte's counsel repeatedly objected that the dogged and prolonged interrogation which followed could only be designed to prejudice the accused, but the trial judge permitted the Deputy Attorney-General to persist, indeed even after receiving the obviously equivocal answer, "Not necessarily for that purpose, no sir," when the court asked if the purpose of the examination was to have the jury infer that Costa's Barn was operated during the period charged. (Italics supplied).

"The majority opinion says:

> "'There was no contention at any stage of the trial that proof of the witness Guarini's pleas of *non vult* to the indictments severally charging that he maintained disorderly houses at Costa's Barn and Hayes' Garage would violate the rule laid down in *State* v. *Costa*, 11 N. J. 239 (1953). And there is no such insistence here. Indeed, the Costa case is not cited on the briefs submitted by the accused."

But the record shows that the very first time Guarini was asked to acknowledge that the indictment to which he had pleaded charged operation of Costa's Barn "from January 24, 1949, until March 31, 1949," this very shortly after he came to the stand, counsel promptly objected on the ground that 'If it be the purpose of the State to prove operation, the pleas to an indictment are not proof of this fact. The State has gone as far as it dare go in the examination of

its witness on the basis of credibility of a witness it calls, and I object to any further questions and particularly to this question on the grounds which I have urged.' True, counsel did not repeat these reasons in connection with subsequent objections except to incorporate them, as the majority notes, in the statement "on the same grounds heretofore urged," but what more could be asked of him? In any event, some three weeks later, when all the proofs were in and before the case was submitted to the jury, the accused's counsel moved 'to strike from the record all testimony taken from Anthony Guarini as to his plea of *non vult* or otherwise to certain indictments charging Costa's Barn operation for specific periods of time, and all testimony which relates to the period of time covered by any charges to which pleas were offered, on the ground that they were totally incompetent in this issue as proof of any fact with regard to time whatsoever,' that 'anything Guarini may have done is proof against him, but not proof as against Chief Witte.' In this court the defendant's brief argues that 'by these rulings in the admission of evidence and the rulings on the motions to strike the evidence * * * we sincerely believe that harmful error was committed in allowing this 'evidence' to remain in the record and come before the jury'; the 'evidence' referred to being specified as 'the testimony of Anthony Guarini, in and by which operation of Costa's Barn and Hayes' Garage for the period between January and March 1949 was to have been established by showing a plea by Guarini to an indictment charging such operation for the period of time referred to and the whole approach to a development of the fact that the attorney for the defendant Witte was the attorney for the so-called 'Big Five,' who had represented these defendants at the time of entering the plea, including that testimony which attempted to revive in the memory of the jurors the publication appearing in newspapers associated with the names 'Adonis,' 'Lynch,' 'Longano,' and 'Moretti.'

"Next, the majority says that the purpose of the Deputy Attorney-General in his interrogation of Guarini was simply 'to refresh his (Guarini's) recollection as to the period of operation.' Even the Dep-

uty Attorney-General did not claim that that was his purpose. To the extent that he was willing to state any purpose, his insistence was that he was merely pursuing matter affecting Guarini's credibility. And I have never known counsel to attempt to have his own witness refresh his recollection as to the contents of a record without offering the witness the record for examination. But here the Deputy Attorney-General took great care not to let Guarini see the judgment record. His tactics were time after time to ask the question whether it was not the fact that the indictment Guarini had pleaded to charged him with operations at Costa's Barn from January 24, 1949 to March 31, 1949—indeed, to press for answers to other like questions even after Guarini answered to one of them that such must be the case if that was the way the indictment read.

"Finally, it is said, 'Guarini's pleas to the indictments returned against him would have had no adverse bearing on the inquiry.' Even if I did not have a contrary view, and I do because to me *the record shows an utter failure to keep the interrogation of Guarini within permissible bounds*, the prejudice to the accused of this action, *coupled with other actions of the Deputy Attorney-General, particularly noticed by the majority and by them denominated 'an indefensible maneuver,' clearly demands a reversal at our hands.* The Deputy Attorney-General was allowed over objection to elicit the wholly irrelevant fact that Witte's trial counsel was Guarini's attorney when Guarini pleaded, and then, totally indefensible on any ground and also over objection, was allowed to question Guarini whether Guarini's asserted closing down of operations at Costa's Barn a month before August 1948 followed a conversation with 'one of the assistant prosecutors,' and upon Guarini's answering that he never knew any prosecutors to ask Guarini whether he did not know that Witte's counsel was an assistant prosecutor at that time. *The entire court subscribes to the observation of the majority that 'there was no warrant whatever for intimating that the accused's trial attorney was also the attorney for the 'big five,' and the insinuation that the operator of Costa's Barn was in league with (his then counsel)*

when he was assistant to the prosecutor of the county.' Where I part with the majority is in their conclusion that 'It is abundantly clear that the impropriety did not have an evil consequence.' *How possibly can this be true of matter necessarily suggestive to juror's minds of the notion that the defendant and his counsel had long been parties to a corrupt conspiracy with notorious lawbreakers? This insidious seed, sown at that early stage of the trial* (which continued for almost three weeks longer), *had a monstrous capacity for flowering into full-blown prejudice against the defendant, not only as to the Costa count but upon all of the counts of the indictment.* True, there is abundant evidence in this case of widespread gambling in Lodi of which defendant knew and which he did nothing to suppress as it was his duty to do. *But, however strongly the evidence points to his guilt, society's interest is not alone that he shall not escape punishment, but equally that his conviction shall be had upon a fair prosecution and a fair trial. Once that barrier to state tyranny is breached all individual liberties are at hazard.*

"The majority says that 'The motion for mistrial was ill-advised as a drastic measure not in keeping with the requirements of justice in the particular circumstances,' and that at best 'the danger of this deviation from the proprieties was fully remediable by a cautionary instruction to the jury to disregard the insinuative queries as utterly irrelevant.' But *I nowhere find that that the trial judge in any wise whatever admonished either the Deputy Attorney-General or the jury.* Upon counsel's motion for mistrial the trial judge merely said, 'I will deny your motion. You may note your objection.' Certainly it cannot be suggested that the responsibility of this court and of the trial judge to deal with such a gross deviation from ethical standards of prosecution shall depend upon whether the accused's counsel adopts one rather than another form of objection. *We in this State have abandoned, I had hoped forever, the notion that a trial is a mere game in which justice is secondary to forms and rules. If counsel had made no objection at all, upon the plainest principles of justice and fairness, the circumstances here exhibited would cry out for remedial action by us*

of our own motion. This case, to me, is of the type we had in mind when, in *State* v. *Bogen*, 13 N. J. 137 (1953), we unanimously adopted what was said by Chief Justice Stone in *New York Cent. R. Co.* v. *Johnson*, 270 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706, 710 (1929):

> "'* * * The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. * * * Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error." (Italics supplied.)

"I would reverse and remand for a new trial."

As further evidence of the prejudicial atmosphere of the trial, attention is directed to testimony of the witness Guarini: (R. 447a)

> Q. Come on, tell the Jury who your lawyer was. A. Why, Mr. Selser. You know who my lawyer was.
>
> Mr. Selser: I move for a mistrial.
>
> The Witness: What is this, Mr. Harris, are you trying to bully me? Your Honor, I appeared before this Court. This is my first time as a witness.
>
> The Court: You better be very quiet. You are not in a very good position and don't forget that.
>
> The Witness: Your Honor —
>
> The Court: Let's not have any outbursts from you because ultimately you will find yourself back where you just came from.
>
> The Witness: Your Honor, I have been in this court for two trials already.
>
> The Court: Now, keep your mouth shut and answer questions.

In the case of *U. S.* v. *Marzano* (C.C.A. 2), 149 F. 2d 923, 926, Judge Learned Hand said:

> "Moreover * * * the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

In view of the fact that the witness was one of the "big five", and that the testimony improperly elicted from him that Mr. Selser was his attorney and also the attorney for the other big-time gamblers representing the syndicate; and furthermore, the insinuation that this witness had seen the petitioner's attorney while that attorney was a prosecutor, and the further insinuation that there was a tie-up of this petitioner with the syndicate as the reason for his nonfeasance in office, the threat by the court in the presence of the jury to send the witness back to jail was prejudicial to the right of petitioner to a fair trial.

It is submitted that this is but one of a large number of incidents having no relation to the issues being tried.

With respect to the witness Marchese, whose testimony has hereinbefore been set out at some length, the prosecutor knew that the witness was then under indictment for maintaining a gambling house in his premises, and was also a police captain and subordinate of petitioner, and that the witness would plead his privilege against self-incrimination. He knew, therefore, that the witness would not only refuse to answer any questions pertaining to the facts directly incriminating him, but also as to any fact which might form a link in the chain of evidence establishing his liability to punishment, penalty, or forfeiture. Furthermore, his statement in the presence of the jury that "I am engaged now in establishing a connection between this witness and the defendant (petitioner) in this case" was "rep-

rehensible," since there is not an iota of evidence of a tie-up between the petitioner and this witness, or any other violation of the law.

See *Arndstein* v. *McCarthy*, 254 U. S. 71; *Rogers* v. *U. S.* 340 U. S. 367.

The proof conclusively shows that the prosecutor evinced no regard for human beings, and his whole object was to run down the petitioner as a beast of prey, without respect to the law of the chase. The proof clearly showed that he spoke and acted as if he regarded the trial as a sort of game, partly of chance, partly of skill, without any regard for the ascertainment of truth and justice; and with the approval of the trial justice was able to bring this "foul evidence" before it, even though the first principles dictate that the essentials of a fair and impartial trial inherent in due process be accorded to the petitioner.

Brown v. *Mississippi*, 297 U. S. 278.

Yet, despite this, he persisted in asking the questions and making unwarranted statements in the presence of the jury, for no legitimate purpose except for the purpose of creating undue prejudice against petitioner, so that he could deliver a mortal wound to the petitioner.

In the Statement of the Case, numerous references are made to the Record of instances involving testimony and exhibits introduced at the trial, which has no relation to or bearing on the issues. Fifty-seven witnesses were called by the State, many for the sole purpose of having them appear before the jury without any evidence relating to the issues and merely to testify as to facts known by them but never communicated to petitioner; and to testify that when these witnesses had given testimony before the Kefauver Committee, the petitioner had also appeared then as a witness.

It is submitted that a jury should not be obliged to listen

for 16 or 17 trial days, lasting for a month, with the only object in view of submitting irrelevant and incompetent cumulative evidence solely for the purpose of befogging the issues, and thus bring about the suppression and not the discovery of the truth. In this the prosecutor succeeded.

In the case of *Amoskeag Mfg. Co.* v. *Head*, 59 N. H. 332, Chief Justice Doe said:

> "The trial to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting."

In *Krulewitch* v. *U. S.*, 336 U. S. 440, 444, 445, this Court, citing *Kotteakos* v. *U. S.*, *supra*, stated:

> "* * * error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict * * * and that a jury convinced of a strong case against him would have recommended leniency."

How can it be said that there is no grave doubt as to whether the errors complained of had substantial influence on the verdict, in view of (1) the trial court's expression of doubt as to the petitioner's guilt at the time of sentence, supra, Note 1, and hence that court's leniency in sentencing petitioner evidenced the weakness of the case against the petitioner; (2) the dissenting opinion hereinbefore quoted; (3) the lack of any direct evidence showing knowledge by the petitioner of gambling activities; (4) the lack of any proof of corruption on the part of petitioner and the further proof that when there was knowledge by petitioner of gambling activities, petitioner acted properly in bringing violators to justice; (5) the known and widespread publicity of the Kefauver Crime Investigating Committee hearings; (6) the injection into the case of the fact that petitioner had appeared as a witness before that committee; (7) the fact that the same court (Supreme Court of New Jersey) has

reversed a conviction of a known gambler on substantially the same ground as on one of the grounds urged here *(State* v. *Costa, supra);* (8) the acknowledgement by the trial court that petitioner was merely guilty of negligence; and (9) the majority opinion conceding and agreeing with the minority that the conduct of the prosecutor was reprehensible?

Why, after spending more than half of his life in public service as chief of police, with an unblemished reputation, with no evidence of immorality or corruption, should petitioner now be put to eternal disgrace, deprived of his livelihood, the loss of his pension to which he has contributed all these years, and jailed, when such grave doubts as to his guilt exist, and no doubt exists as to the unfairness of the trial?

From what has been demonstrated above, it is earnestly urged that petitioner's rights under the Due Process provision of the Fourteenth Amendment have been violated.

In the case of *Bute* v. *Illinois,* 333 U. S. 640, Mr. Justice Burton said:

> "* * * While 'due process of law' has never been defined with precision, the adjudicated cases hold that they should not conflict with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." (Citing *Hebert* v. *Louisiana,* 272 U. S. 312, 316).

In the case of *Chambers* v. *Florida,* 309 U. S. 227, 236, 237, Mr. Justice Black said:

> "* * * From the popular hatred and abhorrence of illegal confinement, torture, and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty, or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. * * *"

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH SITNICK,
Counsel for Petitioner,
416 Fifth Street, N.W.,
Washington 1, D. C.

Of Counsel:
BENJAMIN I. CANTOR,
1035 Grand Concourse,
N. Y. C. 52, N. Y.

TABLE OF CONTENTS

Counter-Statement of Questions Involved 1

Statutes and Rules of Court Involved 2

Counter-Statement of Facts 3

Argument:

Point I—Petitioner has not been deprived of any fundamental or substantial rights by the trial court within the scope and definition of the accepted principles inherent in due process 5

Point II—The assertion by a State's Witness of the privilege against self-incrimination did not prejudice petitioner's substantial rights nor deprive him of a fair and impartial trial 14

Point III—The "harmless error" rule in the federal system differs from the appropriate New Jersey rule and the latter applies in the instant case as a procedural matter; the writ of certiorari sought in this Court may be granted only on a lack of conformity with the principles enunciated by the Fourteenth Amendment and not on the "harmless error" rule 16

Point IV—There was no error in the admission of testimony 25

Conclusion 28

Cases Cited

Arndstein v. McCarthy, 254 U. S. 71 16

Banning v. United States, (C. C. A. Mich.), 1942, 130 F. 2d 330 26

Berger v. United States, 295 U. S. 78 ..... 21, 24

Bihn v. United States, 328 U. S. 633 18

Brown v. Mississippi, 297 U. S. 278 ..... 7, 8, 10, 11
Bute v. People of State of Illinois, 333 U. S. 640, 656 17
Cassell v. State of Texas, 339 U. S. 282 ..... 7, 11
Chambers v. Florida, 309 U. S. 228 23
Dennis v. United States, 339 U. S. 162 23
Frank v. Magnum, 237 U. S. 309 12
Glasser v. United States, 315 U. S. 62 19
People v. Fielding, 158 N. Y. 542 ..... 23, 24
People v. Levan, 285 N. Y. 296 24
People v. Wolf, 183 N. Y. 464 24
Rogers v. United States, 340 U. S. 367 ..... 14, 16
State v. Grillo, 11 N. J. 193 25
State v. Shiren, 15 N. J. Super. 440, 443 27
Stroble v. California, 343 U. S. 181 12
United States v. Marzano (C. C. A. 2d), 1945, 149 F. 2d 923 25
Vierick v. United States, 318 U. S. 237 21
Williams v. Kaiser, 323 U. S. 471, 475 11

Statutes Cited

U. S. Constitution, 5th Amendment 15, 16
U. S. Constitution, 14th Amendment 1, 11, 12, 16
Revised Statutes, New Jersey, Chap. 103, Sec. 1, Title 2 2

Rules Cited

Rule 52, Title 18, Federal Rules of Criminal Procedure 2, 16
Rule 52a, Sec. 391, Title 28, U. S. C. 21
Rule 1:5-1, Sup. Ct. of N. J. 2, 17, 20, 25

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether petitioner has been deprived of any fundamental or substantial rights by the trial court within the scope and definition of the accepted principles inherent in due process.

2. Whether the assertion by a State's witness of the privilege against self incrimination prejudiced petitioner's substantial rights and deprived him of a fair and impartial trial.

3. Whether the "harmless error" rule in the federal system or the appropriate New Jersey rule applies and whether the writ of certiorari sought in this court may be granted only on a lack of conformity with the principles enunciated by the Fourteenth Amendment rather than on the "harmless error" rule.

4. Whether there was any error in the admission of testimony.

STATUTES AND RULES OF COURT INVOLVED

New Jersey Revised Statutes, Chapter 103, Section 1, Title 2:

> "Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors."

Rule 52 of the Federal Rules of Criminal Procedure:

> "(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52, Title 18, U. S. C.

Rule 1:5-1, Rules of Supreme Court of New Jersey:

> "(a) In criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore. Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made *and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury.* (emphasis supplied). The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered. A verdict

of a jury shall not be set aside as against the weight of the evidence unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion."

COUNTER-STATEMENT OF FACTS

On July 25, 1951, the petitioner, Chief of Police of the Borough of Lodi, County of Bergen, State of New Jersey, was indicted by the Bergen County Grand Jury (R. 1a-28a), for non-feasance in office. The indictment contained nine counts. Count 8 was abandoned by the State on the day of trial, and it was accordingly dismissed. (R. 39a).

The trial was had before a jury. It started September 22, 1952, and was concluded October 22, 1952. The State produced 57 witnesses. The petitioner did not take the witness stand.

On motion the Court dismissed Counts 2, 3, and 4, respectively (R. 1282a, R. 1283a). The jury rendered a verdict of guilty as to Counts 1, 5, 6, 7, and 9; and on December 5, 1952, the Court suspended sentence on Count 1, and sentenced petitioner to six months in the county jail on Counts 5, 6, 7, and 9, respectively, and sentences to run concurrently, and fined petitioner $1,000 (R. 1339a).

All nine counts of the indictment are similarly patterned, except that the fifth paragraph of each count states a different specific place where and the times when gambling in the Borough of Lodi was conducted. Each count identified the petitioner as the Chief of Police of said Borough and County; and it was stipulated at the trial that petitioner was such public officer from November 20, 1920, to September 30, 1950 (R. 41a).

Each count alleges that petitioner failed in his "public duty of using and exercising all proper, reasonable, and

effective means, and all lawful means in his power and diligence for the detection, apprehension, arrest, and conviction of offenders against the laws," "for preserving the public peace and insuring good order" in the Borough, and for "suppressing" as disorderly houses, places used for gaming, bookmaking, lotteries, and so on.

Further, that he had under his direction and control the police force of Lodi for the proper enforcement of the public duties so enjoined upon him by law. Each count alleges defendant knew of such unlawful activity, and that he "unlawfully and wilfully did neglect, fail and omit to use and exercise * * * all lawful means within his power * * * but, on the contrary, * * * unlawfully did suffer and permit gambling * * * unlawfully and wilfully did neglect and omit to perform the said public duties so enjoined upon him * * *."

Paragraph 5 of each count of which defendant was found guilty refers to:

Count 1, Costa's Barn, on Route 6
Count 5, 7 Nicholson Street
Count 6, 334 Main Street
Count 7, 225 Garibaldi Avenue
Count 9, 11 Terhune Avenue

As the defendant points out in his brief (Db50 and Db 51) the State's 57 witnesses may reasonably be classified in four (4) groups (a) the telephone company and the telegraph company employees, who testified as to the installation of telephones and tickers at the various locations in Lodi, (b) the participants in the book-making activities (Db50-30), "These were the Erickson employees, the Jula employees, and the Wright employees. There is no doubt about the fact that they were engaging in illegal gambling."; (c) (Db51-16) " * * * the persons who attended the gambling casinos to do some illegal gambling with dice or other like games of chance."; and (d) the operators and employees of the gambling casinos, the stickmen, the restaurant manager, the credit manager, the porter, and others.

ARGUMENT

POINT I

Petitioner has not been deprived of any fundamental or substantial rights by the trial court within the scope and definition of the accepted principles inherent in due process.

The Supreme Court of the State of New Jersey has decided the instant case in accord with applicable decisions of this Court. The majority opinion in the State Court deals exhaustively with the pertinent law both in this Court and in the highest court of New Jersey. See Point III (R. 1354 to 1357). In part, we quote from this opinion, as follows:

> "But there was no warrant whatever for the intimation that the accused's trial attorney was also the attorney for the ' big five ', and the insinuation that the operator of Costa's Barn was in league with him when he was assistant to the Prosecutor of the County. This was an indefensible maneuver for which no justification could be offered on the oral argument; and it is no answer to say that it came in the course of a long trial in which tempers flared". (R. 1355)

The majority opinion having defined the conduct of the State's attorney then proceeded to analyze its consequences in the following language:

> "Yet we are of the view that the danger of this deviation from the proprieties was fully remediable by a cautionary instruction to the jury to disregard the insinuative queries as utterly irrelevant; and so the motion for a mistrial was ill-advised as a drastic measure not in keeping with the (fol. 1358) requirements of justice in the particular circumstances. There is no suggestion that, in itself, proof of such legal representation of the so-called ' big five ' was

harmful; and the witness Guarini made a categorical denial of any such relationship or conversation, this or any other, with the accused's trial attorney when he was an assistant to the Prosecutor; indeed, he was quite emphatic in saying that he did not know the accused's attorney at that time. (R. 1355)

* * *. . . "the prosecuting attorney . . . is under a . . . duty to abstain from conduct prejudicial to a fair trial . . . but where, as here, it is abundantly clear that the impropriety did not have an evil consequence, and at all events was plainly a subject for an admonitory instruction to the jury, if the accused deemed it prejudicial, there was no ground for a mistrial. (R. 1355-1356). A motion for a mistrial is addressed to the sound discretion of the court; and the denial of the motion is reviewable only for an abuse of discretion. The power is to be exercised with the greatest caution, in the furtherance of justice between the accused and the State. Vide Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892); Simmons v. United States, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968 (1891). See, also, 86 A. L. R. 936. Such is our judicial policy. Unless the vice is plainly ineradicable by an instruction to the jury, a mistrial is not allowable of (fol. 1359) right. And, absent a specific request by counsel, a curative instruction is not ordinarily the duty of the trial judge, where a mistrial is refused. Compare State v. Corson, 108 N. J. L. 12 (S. Ct. 1931); State v. Terry, 91 N. J. L. 539 (E. & A. 1918); State v. Hauptmann, 115 N. J. L. 412 (E. & A. 1935). See, also, State v. Lynch, 103 N. J. L. 64 (E. & A. 1926.

* * * "The accused plainly did not suffer prejudice by the interrogation offered as a ground for mistrial. The questions elicited no adverse testimony; the witness denied knowing the attorney at the time and unequivocally repelled the suggestion of contact

with him; and the State's attorney did not intimate personal knowledge contra." (R. 1356)

Petitioner's position is that the essential principles of a fair and impartial trial inherent in due process have been denied him by the refusal of the trial court to declare a mistrial. The case of *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed 682 (1936) is thoroughly discussed infra. Petitioner further relies on *Cassell v. State of Texas*, 339, U. S. 282, 70 S. Ct. 639, (1950) and quotes certain dicta from the dissenting opinion of Justice Jackson who wrote (Pb33):

> "The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables-unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh." (Pb33).

Petitioner has taken this quotation out of context and this dicta should be read in the light of the preceding sentence which reads:

> "It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least, may prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand." (pages 301-302)

Even more important is the fact that this case determines the fundamental question of the purposeful discrimination against Negroes in the selection of the grand jury. Mr. Justice Jackson's dissent is from a reversal of the conviction of the defendant as decided by the majority of this Court.

In fact, Mr. Justice Jackson's opinion states the applicable law, in the instant case, with clarity, as follows:

> "In setting aside this conviction, the Court is moved by a desire to enforce equality, in that realm where, above all, it must be enforced—in our judicial system. But this conviction is reversed for errors that have

nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue. *This conflicts* with *another principle important to our law, viz., that no conviction should be set aside for errors not affecting substantial rights of the accused.*" (page 299) (emphasis supplied)

The petitioner cites *Brown v. Mississippi, (supra)* (R46) in support of his contention that the essentials of a fair and impartial trial inherent in due process were not accorded to him. This case differs radically with the case at bar. Furthermore, the instant case falls outside of the scope of "the essentials of a fair and impartial trial inherent in due process" as defined in the *Brown case.*

The defendants in the *Brown case* were convicted of the crime of murder on confessions extorted from them by police officers using brutality and violence. They were indicted on one day and arraigned for pleading on the same day. Trial was begun on the next day and concluded the following day. They were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. The facts of merciless whippings and brutality were not only undisputed but were admitted to have been done by officers of the state and all this was known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding. In an opinion by Chief Justice Hughes, the court held,

> "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Massachusetts, supra; Rogers v. Peck, 199 U. S. 425, 434, 26 S. Ct. 87, 50 L. Ed. 256. The state

may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; Snyder v. Massachusetts, supra. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. Moore v. Dempsey, 261 U. S. 86, 91, 43 S. Ct. 265, 67 L. Ed. 543. The state may not deny to the accused the aid of counsel. Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' Hebert v. Louisiana, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these peti-

tioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

* * * That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient.

* * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner."

The essential elements of due process as delineated in the quotation from the *Brown case* above cited have not been violated in the case at bar because of the absence of any direct infringement of the rights of the petitioner himself. There was no offense to "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Brown v. Mississippi (supra.)*. The threat of the trial court to send the witness Guarini back to jail in the light of Guarini's background including his commonly-known reputation of

being one of the "big five" of Bergen County gambling operations and his conviction and sentence and that Guarini's attorney was petitioner's attorney could hardly be called prejudicial to any rights of the petitioner. This was a derogatory description of the witness, but this cannot be evaluated on an equal plane with (1) the substitution of "a jury trial" with "trial by ordeal"; (2) the hurrying of an accused to conviction under mob domination; (3) the denial to the accused of the right to counsel; (4) "the deliberate deception of court and jury by the presentation of testimony known to be perjured"; (5) the contriving of a conviction by state authorities "solely upon confessions obtained by violence".

It is respectfully submitted that the *Brown case* is not applicable to the factual situation in the instant case and actually supports the contention of the State in seeking a denial of the issuance of the writ of certiorari sought by the petitioner.

In summing up the argument up to this point, it can be stated that the essentials of a fair trial inherent in due process in the *Cassell* and *Brown* cases are therefore based upon the solid ground that substantial rights of the accused must be affected before a reversal of a conviction can be ordered. The substantial right in the *Cassell* case was the purposeful discrimination exercised against Negroes in selecting the grand jury. The substantial right in the *Brown* case was the extortion of a confession from the defendants by brutality and violence known both to the prosecuting attorney and the trial judge at the time of the trial. No such substantial right in any sense of the word "substantial" is involved in the instant case.

Petitioner quotes certain dicta (Pb33, 34) from the case of *Williams v. Kaiser,* 323 U. S. 471, 475, 65 S. Ct. 363, 366. This case holds that the right to counsel in a criminal prosecution in a capital case is protected by the Fourteenth Amendment of the Federal Constitution and that the defendant was deprived of this right.

The right to counsel is a fundamental right and its deprivation is violative of the Fourteenth Amendment. In the instant case, no such violation occurred, nor was any other basic right of the petitioner violated.

The case of *Stroble v. California,* 343 U. S. 181, 72 S. Ct. 599, involved the matter of inflammatory and prejudicial newspaper reports published in the Los Angeles press against the defendant who was indicted and convicted of the murder of a girl six years of age. It also involved the action of the District Attorney who released to the press, on the day of defendant's arrest, certain details of the confession which defendant had made, and the statement that the defendant was guilty and sane. The factual situation in this case is sharper and more aggravated than that which exists in the instant case. The Court held that the defendant was not deprived of due process (page 195), and while the Court deprecated the actions of the District Attorney in his statements to the press, nevertheless, these actions "did not necessarily prevent a fair trial." (page 193).

In the case of *Frank v. Magnum,* 237 U. S. 309, 334, 35 S. Ct. 582 (1915) the Court stated:

> "This familiar phrase—whether the state, taking into view the entire course of its procedure, has deprived him of due process of law—(parenthetic statement supplied) does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, *but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.*" (emphasis supplied)

The dissenting opinion of Mr. Justice Holmes in the same case, 237 U. S. 347, asserts:

> "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted."

At this point, it is necessary to place the instant case in a proper perspective and relationship with the applicable decisions of this Court interpreting the Fourteenth Amendment. The petitioner was convicted by a jury for non-feasance in his office as Chief of Police. Specifically he was charged with knowing and wilfull failure of his official duties in relation to gaming on certain premises. The burden of proof rested upon the state to establish the gambling operations, widespread and notorious as they were, at certain places in the Borough of Lodi. As stated by the majority opinion of the Supreme Court of New Jersey:

> "In its nature the case made by the State involved witnesses of unsavory character; and the State's bonafide efforts to adduce relevant evidence from such witnesses cannot be denounced as incompatible with fair play." (R. 1355)

The witness Guarini was called to establish his conduct of Costa's Barn as a gaming house. The reference to his plea of non vult to an indictment charging the keeping of a disorderly house for the purpose of refreshing his recollection is unexceptionable under New Jersey decisions. This does not come within the scope and definition of the principles of due process because it is procedural and even if irregular cannot be the subject of re-

view by this Court.

In the same category is the denial of the motion for a mistrial by the trial court and the absence of a specific request by counsel for petitioner for a curative instruction. These are also matters of procedure which the decisions of this Court will not disturb. (R. 1356). Petitioner was not prejudiced and there was no violation of the fundamental conception of a fair trial within the accepted principles inherent in due process.

POINT II

The assertion by a State's witness of the privilege against self incrimination did not prejudice petitioner's substantial rights nor deprive him of a fair and impartial trial.

Petitioner states (at page 45) the following:

> "With respect to the witness Marchese, whose testimony has hereinbefore been set out at some length, the prosecutor knew that the witness was then under indictment for maintaining a gambling house in his premises, and was also a police captain and subordinate of petitioner, *and that the witness would plead his privilege against self-incrimination. He knew, therefore, that the witness would not only refuse to answer any questions pertaining to the facts directly incriminating him, but also as to any fact which might form a link in the chain of evidence establishing his liability to punishment, penalty or forfeiture. .*" (emphasis supplied).

Petitioner cites *Rogers v. United States* 340 U. S. 367 in support of his argument, when in actuality, this case holds exactly the opposite of his contention. The court, in an opinion by Chief Justice Vinson, held:

> "If petitioner desired the protection of the privilege against self-incrimination, she was required to claim

it." (at page 370) citing United States v. Monia, 1943, 317 U. S. 424, 427, 63 S. Ct. 409, 410, 87 L. Ed. 376.

The court continued: (page 371)

"The privilege 'is deemed waived unless invoked'. United States v. Murdock, 1931, 284 U. S. 141, 148, 52 S. Ct. 63, 64, 76 L. Ed. 210. "Furthermore, the decisions of this court are explicit in holding that the privilege against self-incrimination 'is solely for the benefit of the witness, and is purely a personal privilege of the witness', citing (in footnote, page 371) Hale v. Henkel, 1906, 201 U. S. 43, 69, 26 S. Ct. 370, 376, 50 L. Ed. 652 and McAllister v. Henkel, 1906, 201 U. S. 90, 91, 26 S. Ct. 385, 50 L. Ed. 671.

It is therefore apparent that the only way the prosecutor in the instant case could ascertain whether the witness Marchese would invoke the privilege against self-incrimination would be to call him as a witness. The fact that the witness was himself under indictment does not in any way alter the quality of the privilege against self-incrimination, nor does it change the requirement that the privilege must be invoked by the witness personally.

Petitioner therefore seems to be questioning the propriety or the ethics of the prosecutor in calling Marchese to the stand when he states at page 45. . . . that "his statement. . . . was reprehensible since there is not an iota of evidence of a tie-up between the petitioner and this witness, or any other violator of the law". It is respondent's contention that the prosecutor would have been derelict in his duty if he had not called Marchese as a witness. The fact that Marchese invoked the privilege guaranteed to him by the Fifth Amendment and that therefore the "tie-up between the petitioner and this witness or any other violator of the law" could not be clearly shown was ascertained only after Marchese left the witness stand.

Petitioner also cites *Arndstein v. McCarthy*, 254 U. S. 71, 41 S. Ct. 26 (1920) in support of the same argument as advanced in the case of *Rogers v. United States (supra)*. This case has no application whatsoever to the instant case.

The point made by petitioner (Pb47) in the case of the testimony of the fifty-seven (57) witnesses called by the State to the effect that the prosecutor submitted "irrelevant and incompetent cumulative evidence solely for the purpose of befogging the issues and thus bring about the suppression and not the discovery of the truth" is without merit for the reason that the petitioner has not specified the testimony so characterized by him to show its cumulative effect. In the case of both Guarini and Marchese, parts of whose testimony have been included in the petition, a reading of same will indicate forcefully that the prosecutor sought the discovery of the truth and not the suppression of it and succeeded in the case of Guarini despite this witness's reluctance and hostility and did not succeed in the case of Marchese because this witness invoked his privilege under the Fifth Amendment.

POINT III

The "harmless error" rule in the Federal system differs from the appropriate New Jersey rule and the latter applies in the instant case as a procedural matter; the writ of certiorari sought in this Court may be granted only on a lack of conformity with the principles enunciated by the Fourteenth Amendment and not on the "harmless error" rule.

Rule 52 of the Federal Rules of Criminal Procedure provides:

"(a) Harmless error. Any error, defect, irregularity

or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52, Title 18, U. S. C.

The applicable New Jersey rule is as follows:

"(a) In criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore. Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made *and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury*. (emphasis supplied). The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered. A verdict of a jury shall not be set aside as against the weight of the evidence unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice of passion". Supreme Court of New Jersey, Rule R. R. 1:5-1.

In *Bute v. People of State of Illinois*, 333 U. S. 640, 656, 68 S. Ct. 763, 772, (1948), Mr. Justice Burton declared:

> "... this Court has decided that the Fourteenth Amendment does not, through its due process clause or otherwise, have the efefct of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights ."

and at page 659, 773:

> "So here the procedure followed by Illinois (failure to offer or assign counsel) (parenthetic statement supplied) should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless the Illinois procedure violates 'the very essence of a scheme of ordered liberty' and that its continuance would violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (long list of cases cited by the court at this point).

In *Bihn v. United States*, 328, U. S. 633, 66 S. Ct. 1172, (1946) at page 638, (also cited by petitioner in his brief) (Pb36), the question to be decided by this court involved the charge to the jury. The court held that the charge erred because it put the burden on the defendant to prove her innocence by proving the identity of some other person as the thief. On the question of the "harmless error" phase of the case, Mr. Justice Douglas stated:

> "The 'harmless error' statute, Judicial Code § 269, 28 U. S. C. A. § 391, means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. Boyd v. United States, 271, U. S. 104, 107, 46 S. Ct. 442, 70 L. Ed. 857. Yet as stated in McGandless

> v. United States, 298 U. S. 342, 347, 348, 56 S. Ct. 764, 766, 80 L. Ed. 1205 'an erroneous ruling which related to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial' ".

The case of *Glasser v. United States*, 315 U. S. 62, 62 S. Ct. 457 (1942) sets forth the proposition which prevails in the instant case at page 83:

> "Perhaps the court did not attain at all times that thorough-going impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioner were not affected. The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting. Cf. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 240, 60 S. Ct. 811, 852, 84 L. Ed. 1129; Goldstein v. United States, 8 Cir. 63 F. 2d 609, United States v. Warren, 2 Cir., 120 F. 2d 211".

In the instant case, the maneuver of the state's attorney is involved rather than the conduct of the trial judge as in the *Glasser* case. Otherwise the analogy fits perfectly. For the petitioner did not suffer prejudice by the interrogation offered as a ground for mistrial. Petitioner has quoted in his brief twelve (12) pages of excerpts from the transcript of testimony (Pb7 to Pb18) relating to the reluctant State's witness, Anthony Guarini, and the difficulty had with him, over defendant's many overruled objections, to get him to state how he had pleaded to an indictment charging he maintained a disorderly house at Costa's Barn. Defense counsel interposed an objection when the fact was interjected by the prosecution that defense counsel also represented the witness Guarini when the latter entered a plea of guilty to an indictment charging him with operating a gaming establishment.

(R. 446). The witness Guarini immediately adopted the cue given to him by the objection of defense counsel. Guarini professed ignorance of the operating dates charged in another indictment relative to Costa's Barn. (R. 446). Defense counsel and the witness persisted in this course. (R. 448 to R. 457). It was the right and duty of the State to develop the true circumstances surrounding these pleas and in view of defense counsel's statements in the presence of the jury (R. 449 to R. 451) the petitioner was benefited from this exchange rather than prejudiced, and the very thing that defense counsel desired, was done for him. (R. 451).

Furthermore, it is submitted that petitioner does not allege under R. R. 1:5-1 (supra) that the jury was biased or prejudiced, or that the verdict rendered was the result of bias, passion, prejudice or partiality. It will be noted that this challenge is only made on appeal after conviction and sentence and in seeking this writ (Pb44). The "prejudicial atmosphere of the trial" alleged (Pb44) on appeal to the New Jersey Supreme Court and in support of this writ must be viewed in the light of the fact that no motion for a continuance was made before trial, no challenge to the array, or to the polls, were at any time interposed, nor was any motion made for a change of venue, or for a foreign jury, nor was any objection entered upon completion of the selection of the jury that it could not impartially and fairly try the issue.

In fact, the petitioner in his brief before the Appellate Court below conceded (Db29-22):

> "There is in the record page after page of 'testimony' not competent to prove anything more than the fact we now know, that 'gambling offenses' took place in Lodi before the time charged in the indictment, during the time charged and after the time charged. . . We now know that there was 'big time gambling' by Erickson and his associates; by Doto and the so-called 'big five' . . . One must read the entire record

to realize that this 'hysteria' was effectively promoted or revived."

Petitioner relies on the cases of *Vierick v. United States*, 318 U. S. 237, 63 S. Ct. 561, (1943) and *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 (1935) (Pb37-38).

These cases do not involve the due process clause but rather the application of statutory rules for granting a new trial for errors committed in the United States District Courts respectively. The *Berger* case interpreted Section 391 of Title 28 of the United States Code. (Now Rule 52a).

These two cases are likewise distinguishable from the instant case in a very substantial manner.

The *Vierick* case involved conduct of the prosecuting attorney (pages 247, 566) which prejudiced petitioner's right to a fair trial. In his closing remarks to the jury, the United States Attorney appealed to passion and prejudice by reference to war in a case charging a foreign agent with failure to register. The prosecutor stated that the American people were relying on the jury for protection and that the jury had a "duty to perform here". The court stated (pages 248 or 566):

"At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial . . . . "

The *Berger* case involved continuous misconduct of the prosecuting attorney. The court described this conduct as follows (pages 84 or 631):

"That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of wit-

nesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner . . . . "

The court then held (pages 89 or 633):

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached. Compare Fitter v. United States (C. C. A.) 258 F. 567, 573; Johnson v. United States (C. C. A.) 215 F. 679, 685, L. R. A. 1915A, 852; People v. Malkin, 250 N. Y. 185, 201, 202, 164 N. E. 900; State of Iowa v. Roscum, 119 Iowa, 330, 333, 93 N. W. 295. *Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded*". (emphasis supplied).

It is apparent, therefore, that the prejudice to the defendant's substantial rights in both the *Vierick* and *Berger* cases was directly achieved by the prosecuting attorney, not by a single instance but in unmistakable language appealing to prejudice and passion in the one case and in pronounced and persistent misconduct in the other. In the instant case, reliance is had by petitioner upon one

incident, which involved him only indirectly and the witness Guarini and his defense counsel directly and which, in the final analysis, was not prejudicial but benefited the petitioner's case in view of the elicited testimony from the witness (Pb44).

The case of *Dennis v. United States*, 339 U. S. 162, 70 S. Ct. 519 (1950) cited by petitioner (Pb36) is not applicable. In this case Dennis was convicted for wilfully failing to appear before the Committee on Un-American Activities of the House of Representatives in compliance with a subpoena served upon him. Certiorari was granted but limited to the question whether Government employees could properly serve on the jury which tried petitioner. The court held that Dennis was tried by an "impartial jury" and affirmed the conviction.

Petitioner also cites *Chambers v. Florida*, 309 U. S. 228, 60 S. Ct. 472, (1940) (Pb48). This case is inapplicable as it concerned the denial of due process because of the improper obtaining of a confession.

Petitioner cites a number of cases in the New York Court of Appeals. The case of *People v. Fielding*, 158 N. Y. 542, 53 N. E. 496 (1899) is analogous to *Berger v. United States supra*. The persistent and violent speech of the prosecuting attorney in his summation to the jury prompted a reversal. The court described this misconduct as follows (p. 500):

> " . . . improper appeals to sympathy, prejudice, or passion, the starvation of children by their widowed mothers, the knotted fingers and bent forms of old men, the denunciation of the defendant as a thief, or the bugbear of the unpardonable sin, held up before the jury so forcibly . . . . defendant . . . . has not had the fair and impartial trial which the law prescribes for a person charged with crime".

This case is clearly distinguishable from the instant case where no prejudice inured to the petitioner in the

testimony elicited by the prosecutor from the witnesses Guarini and Marchese and where the element of persistency was lacking because of the isolated incidents in a long trial and finally because even if we assume that error was committed it was not in summation or in the charge to the jury where lasting impressions on the minds of the jury are made but in an exchange between counsel for the State and defense and a witness (not the petitioner) who was on the stand.

In *People v. Wolf,* 183 N. Y. 464, 76 N. E. 592, (1906), the quotation cited by petitioner places this case in the same category as *People v. Fielding (supra) and Berger v. United States (supra).* This is as follows (Pb36):

> "The trial judge allowed and sanctioned *continuous departures from the law by the prosecuting attorney,* although he should have known that it was his duty to prevent them, . . ."

In this case, the prosecutor alluded to other crimes, not charged in the indictment, committed upon the person of the complaining witness by parties other than the defendant, and this, in his opening address to the jury. The prosecutor then committed a number of other violations in the trial of the cause, all of which added together amounted to a denial of a fair trial.

The case of *People v. Levan,* 285 N. Y. 296, 64 N. E. 2d 341, (1945) involved argument of the prosecuting attorney on summation in a capital case where he invoked passion and prejudice by his emphatic statement described by the court as follows (p. 346):

> "We cannot say, however, with assurance that the jury did disregard the clear implications from the emphasis placed by the prosecuting attorney upon the damning fact that the defendant had absented himself without leave from his military duties in a time of war. The virus thus implanted in the minds of the jury is not so easily extracted".

Petitioner also cites *State v. Grillo*, 112 N. J. 193 (1952). This case held that confessions obtained from defendants charged with murder were voluntary and that statements of the prosecuting attorney that defendants were members of an organized criminal group, and that the statute providing for recommendation of life imprisonment was not intended to apply to the defendants, were not grounds for reversal.

The case of *United States v. Marzano*, (C. C. A. 2d) 1945, 149 F. 2d 923, cited by petitioner is distinguishable from the instant case because of the misconduct of the trial judge who called two co-defendants as witnesses who had pleaded guilty and were awaiting sentence, and, upon their refusal to implicate defendant in reminding co-defendants the judge was going to sentence them and then asked them if they desired to change their testimony. This was error predicated upon the theory that the testimony of co-defendants must be satisfactory to the court to secure favor.

POINT IV

There was no error in the admission of testimony.

Petitioner states that "in the first volume of the record alone sixty (60) objections to the admission of 'testimony' were made and '55 of which were overruled'". He then avers that "the following are references to testimony which had no relation to issues involved therein". (Pb28 to 31)

Rule 1:5-1 of the Rules of the Supreme Court of New Jersey, supra, provides:

> " . . . Error in the admission . . . of testimony, . . . or in the denial by the court of any matter resting in discretion, or in any other ruling or order made dur-

ing the course of the trial, shall be cause for reversal if specific objection thereto was made and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury"

Petitioner does not state where he suffered any manifest wrong or injury as the result of the admission of irrelevant testimony. In fact, the gaming operations which this testimony sought to prove was finally admitted by the petitioner in his brief in the Supreme Court of New Jersey (Db29).

Furthermore, the petitioner points out in his brief in the court below (Db50 and Db51) that the State's witnesses may be classified in four (4) groups (a) the telephone company and the telegraph company employees who testified as to the installation of telephone and tickers at the various locations in Lodi; (b) the participants in the bookmaking activities (Db50), "These were the Erickson employees, the Jula employees and the Wright employees. There is no doubt about the fact that they were engaged in illegal gambling."; (c) (Db51). " . . . the persons who attended the gambling casinos to some illegal gambling with dice or other like games of chance."; and (d) the operators and employees of the gambling casinos, the stickmen, the restaurant manager, the credit manager, the porter, and others.

In this trial for the non-feasance of a police officer, testimony showing the prevalence of notorious and widespread gambling in the Borough of Lodi was admissible. And, even if we assume that the testimony was irrelevant, it is still the burden of petitioner under the New Jersey rule to point out the specific instances of manifest wrong and injury and beyond that, in this Court, the deprivation of any substantial right under the due process clause.

In this connection we refer to the case of *Banning v. United States,* (C. C. A., Mich.) 1942, 130 F. 2d, 330, certiorari denied, 63 S. Ct. 434, 317 U. S. 695, 87 L. Ed.

556 which held:

> "The admission of evidence which is irrelevant and immaterial because the facts sought to be proved are remote does not render such admission reversible error, unless the accused was prejudiced or harmed thereby or deprived of substantial rights."

Also in *State v. Shiren,* 15 N. J. Super. 440, 443, (App. Div. 1951, affirmed 9 N. J. 445) (Sup. Ct., 1952) the court said:

> "As a general proposition it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue, is relevant and admissible. 20 Am. Jur., Sec. 247, pp. 240, 241."

It is respectfully submitted that the petitioner has failed to point out error in the admission of testimony, or wherein the petitioner suffered manifest wrong or injury of any substantial right guaranteed to him by the basic principles inherent in the due process clause of the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

GROVER C. RICHMAN, JR.
Attorney General of New Jersey

On the Brief:
JOHN G. THEVOS
Deputy Attorney General

Office - Supreme Court,
FILED
MAY 11 1954
HAROLD B. WILLEY, C

32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 592

HENRY R. WITTE, *Petitioner,*

v.

THE STATE OF NEW JERSEY.

Petition for Rehearing on a Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

JOSEPH SITNICK,
Counsel for Petitioner,
416 Fifth Street, N.W.,
Washington 1, D. C.

Of Counsel:
BENJAMIN I. CANTOR
1035 Grand Concourse
N. Y. C. 52, N. Y.

Printed by Law Reporter Printing Co., 518 5th St. N.W., Wash., D. C.

In The

Supreme Court of the United States

October Term, 1953

No. 592

Henry R. Witte, *Petitioner*,

v.

The State of New Jersey.

Petition for Rehearing on a Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

To the Honorable, the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Comes now the petitioner and presents this petition for a rehearing on the petition for a writ of certiorari filed in this case.

JURISDICTION

The petition for a writ of certiorari was filed on and denied on April 26, 1954. This petition for rehearing is filed within fifteen days from April 26, 1954, in accordance with Rule 33 of this Court.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioner reiterates each and every ground set forth in the original petition, and further suggests to the Court the following:

I. A circumstance of substantial effect has intervened since the filing of the original petition:

Petitioner, who had been Chief of Police of Lodi, Bergen County, New Jersey, was convicted for non-feasance in office. A large number of witnesses was presented at the trial of petitioner, which resulted in his conviction.

After the filing of the petition herein, one Walter G. Winne, who had been the prosecutor in Bergen County at the time of the alleged commission of the alleged offenses by petitioner, was put to trial on an indictment charging misconduct on his part as prosecutor at about the same time and similar to that charged to the petitioner. Substantially the same evidence was adduced in support of the indictment against the said prosecutor as against the petitioner. And whereas the Court refused to grant motions for acquittal in favor of petitioner, the same Court, through another judge, granted such motions on behalf of the said prosecutor.

Petitioner has complained about the unfairness of his trial, as argued in his original petition herein; and while he realizes that the above statement is not a full presentation of the facts pertaining to the trial of the said prosecutor, it demonstrates to petitioner again that he was not treated fairly; and he respectfully prays that the Court grant this petition for rehearing and that he be given an opportunity to demonstrate in more detail the inequality of treatment accorded him by the trial court.

II. There was another ground previously available to petitioner, although not presented:

Petitioner had argued that his rights under the 14th Amendment were violated, in that he was not accorded a fair and impartial trial within the contemplation of the due process clause of that Amendment. As petitioner interprets the brief filed in opposition to his petition for certiorari, it is argued that what petitioner complained of were *procedural* irregularities and that such irregularities are not encompassed by the 14th Amendment.

It is respectfully submitted that this Court has answered such an assertion in the case of *Whitney* v. *California*, 274 U. S. 357, 373, 71 L. Ed. 1095, 1105, wherein Justice Brandeis in his concurring opinion stated:

> "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the 14th Amendment applies to matters of substantive law as well as to matters of procedure."

CONCLUSION

For the reasons already argued in his original petition, and for the further reasons contained herein, it is respectfully urged that a rehearing be granted; that upon further consideration the order of April 26, 1954, denying the petition for certiorari be revoked; and that the writ of certiorari issue.

JOSEPH SITNICK,
Counsel for Petitioner,
416 Fifth Street, N.W.,
Washington 1, D. C.

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the same is restricted to the grounds above specified; namely, that a circumstance of substantial effect has intervened since the filing of the petition for Writ of Certiorari, and that there was another substantial ground available to petitioner, although not previously presented.

JOSEPH SITNICK,
Counsel for Petitioner.